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Supreme Court, U.S.
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In The
Supreme Court of the United States

The Children's Fund et al.,
Petitioners,

v.

Springfield Holding Co. Ltd. LLC et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Constitution of the United States forbids the courts of the United States from issuing "unpublished" decisions that are not admitted to be precedents.

2. Whether a managing partner of a partnership who has been found by a court of law to have: (a) drafted and used "severely deficient" documents in a self-serving disputed transaction with minority partners, (b) shown "a general lack of credibility," and (c) come to court with "unclean hands" has fulfilled the duties of a managing partner under the Uniform Partnership Act.

3. Whether the mandatory accounting provisionof the Uniform Partnership Act is fully satisfied when the minority partner in a disputed transaction is allowed to sit in court to listen to the disputed, hostile testimony of a professional witness with

whom he has never spoken, whom he did not approve, and who was paid for his testimony only by the managing partner.

4. Whether minority partners under the Uniform Partnership Act may waive the duties of the managing partner.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE-DISCLOSURE STATEMENT

The parties before this Court are the same as the parties to the proceeding in the court below. Petitioners include the Children's Fund, an Illinois Limited Liability Company (which owns and operates a private school in Chicago, Illinois), and Robert L. Stone, Cynthia A. Stone, and Robert Stone, M.D. (managers of the Children's Fund). Petitioners are investors and minority partners in Springfield Holding Co. Ltd. LLC, an Oklahoma limited-liability

company (which owns and operates commercial real estate in Oklahoma) Petitioners were the defendants and appellants below.

Respondents include Springfield Holding Company Ltd. LLC; David H. Kinnard (majority partner and managing partner of Springfield Holding Co. Ltd. LLC); Roger L. Kinnard (his brother and fellow majority partner); and Mark Reinitz (their employee). Respondents were the plaintiffs and appellees below.

No publically traded entity owns more than a 10 percent interest in either The Children's Fund or Springfield Holding Co. Ltd. LLC.

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The Children's Fund, Cynthia A. Stone, Robert L. Stone, and Robert Stone M.D. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the 10th Circuit.

DECISIONS BELOW

On August 25, 2008, the District Court for the Western District of Oklahoma entered a "Judgment" in favor of Respondents and against Petitioners, together with a "Findings of Fact and Conclusions of Law." On June 8, 2009, the Court of Appeals for the Tenth Circuit entered an (unpublished) "Order and Judgment" affirming the district court's judgment. On July 15, 2009, the Court of Appeals, without filing an opinion or giving reasons, entered an "Order" denying Petitioners' Petition for rehearing. Petitioners are seeking a writ of certiorari to review the "Order and Judgment" of June 8, 2009 and the "Order" of July 15, 2009.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2009. The court below denied a rehearing on July 15, 2009. This Petition is due on or before October 13, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TEXTS OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Uniform Partnership Act ("UPA") provides:

> §204(4). Rules of Construction.
> This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those sates which enact it.
>
> §205. Rules Governing.
> In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.
>
> §219. Partnership Books.
> The partnership books shall be kept . . . at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.
>
> §220. Duty of Partners to Render Information.

> Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . .
>
> §221. Partner Accountable as Fiduciary..
> (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.
>
> §222. Right to an Account.
> Any partner shall have the right to a formal account as to partnership affairs: (a) if he is wrongfully excluded from the partnership business or possession of its property by his copartners . . . or (d) Whenever other circumstances render it just and reasonable.

Article III, Section 1, Clause 1 of the Constitution of the United States provides:

> The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish.

The Fifth Amendment to the Constitution provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Respondents are an Oklahoma LLC and its managing partners, who own and control multiple apartment complexes in Norman, Oklahoma. Petitioner The Children's Fund is an Illinois LLC, and Petitioners Cynthia Stone, Robert L. Stone, and Robert Stone M.D. are citizens of Illinois who were induced by Respondent Roger Kinnard to invest in Springfield Holding Company. Petitioners are minority partners in Respondent Springfield Holding Company Ltd. LLC. Jurisdiction below was based on diversity of citizenship. In a disputed transaction, Respondents claim that Petitioners transferred all of their shares to Respondents.

With regard to the disputed transaction, Petitioners alleged (and fully briefed) multiple violations of the Uniform Partnership Act ("UPA"), which contains a right to a mandatory accounting at the de-

mand of any partner and imposes fiduciary duties on all managing partners with regard to their dealings with minority partners. The district court found that Respondents, who controlled all partnership actions, had (a) drafted and used "severely deficient" documents for use in the disputed transaction, (b) shown "a general lack of credibility," and (c) came to court with "unclean hands." Nevertheless, after finding those facts, the district court granted Respondents' every prayer and ruled that Respondents may keep all of the disputed shares—because the Petitioners had unintentionally waived all of the Respondents' duties toward minority partners under the UPA.

At trial, Petitioners were permitted to sit in court to listen to the disputed, hostile testimony of a professional witness with whom they had never spoken, whom they did not approve, and who was

paid for his testimony only by the Respondents. The district court then denied Petitioners" prayer for an independent, certified accounting.

In other words, the district court either radically reinterpreted or disregarded the State law that, under the *Erie* doctrine,[1] it is required to apply in cases of diversity jurisdiction.

Petitioners made a timely appeal to the United States Court of Appeals for the Tenth Circuit, which affirmed the district court's opinion, while ruling that its own decision has no value as a precedent in other cases. Petitioners then filed a timely petition for a rehearing, setting forth the same argument presented in this Petition for Certiorari. The Court of Appeals denied that petition summarily without any opinion and without giving any reasons.

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[1] *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

Before the case at bar, there had been no ambiguity in the case law interpreting the UPA. In all other circuits, the UPA is vigorously enforced. For example, minority partners' right to an independent, certified accounting is so important that a Temporary Restraining Order is available to enforce it summarily. For another example, all general partners are trustees for all minority partners. There is zero tolerance for wrong-doing by managing partners. See, e.g., *NCAS Realty Management Corp. v. The Nat'l Corp. for Housing Partnerships,* 143 F.3d 38 (2nd Cir. 1998). In *NCAS Realty*, plaintiff, as in the case at bar, was local managing partner, and defendant, as in the case at bar, was an out-of-state partner. Defendant, as in the case at bar, counterclaimed for an accounting based on allegations of self dealing. The district court, as in the case at bar, dismissed Defendants' counterclaim.

The court of appeals reversed, ordering permanent access to the partnership books and records. This case is exactly on point.

For another example, concealment alone is a breach of a managing partner's duty to minority partners. *Jennison v. Bierer,* 601 F.Supp. 1167 (D.Vt. 1984). For another example, exclusion alone is a breach of that duty. *Williams v. Tritt,* 262 Ga. 173, 415 S.E.2d 285 (1992). Most importantly, the burden of proof is on the managing partner. *Konover Development Corp. v. Zeller,* 228 Conn. 206, 635 A.2d 798 (1994). And the law of Oklahoma incorporates all precedents regarding partnerships from all other UPA States, so all of the above are not merely advisory. 54 Okl.St. §204(4) and 205 (1981). The sum of the law is that a partnership is more like a marriage than a marketplace.

No conscientious and responsible court like the Tenth Circuit would have ruled as it did, affirming a self-contradictory opinion that disregards (or radically reinterprets) State law in a way that places the Tenth Circuit in conflict with all other circuits---unless it could place its decision outside the Anglo-American legal system of precedents. So that is what it did. It employed the simple expedient of declaring that its decision is "unpublished"---which means that it is published in Lexis/Nexis, Westlaw, and West's *Federal Appendix* but will not be considered to be law the next time an indistinquishable controversy arises between parties similar to those in the case at bar. "Law today, gone tomorrow."[2] This expedient enables the court below

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[2] Jennifer Adams, Comment, "Law Today: Gone Tomorrow," 53 *Baylor Law Review* 659 (2001).

to avoid tomorrow the logical consequences of its actions today.

Worse, there is no authority for the expedient of issuing precedents that are paradoxically not admitted to be precedents. There is no precedent in any decision of the Supreme Court. There is no statute authorizing the expedient. And there is no precedent in the common law. The expedient is not even authorized in any of the published rules of the 10th Circuit. (It seems that "unpublishing" by the court below is derived from an unpublished rule.)

Therefore, Petitioners have been directly and irreparably harmed by the "unpublishing system." Petitioners argue herein that the "unpublishing system" (which began only recently in 1973 and has mushroomed in recent years until it now subsumes 84% of all decisions issued by the circuit courts of

appeal)[3] violates Article III and the Due Process Clause of the Constitution. Furthermore, Petitioners will argue that the case at bar shows that the "unpublishing system" produces substandard decisions that have the appearance of impropriety.

Finally, Petitioners have attached their briefs before the court below, in Appendices "E" and "F," to show that both the UPA issues and the Constitutional issues were properly raised below in a timely fashion.

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[3]See especially David Cleveland, "Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System," 92 *Marquette Law Review* 686 (2009). This petition borrows heavily from Professor Cleveland's article, which is the most thorough and well researched authority on the main issue presented by the case at bar.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BY THE COURT BELOW IS IN CONFLICT WITH ALL OTHER CIRCUITS ON ALL FOUR QUESTIONS PRESENTED BY THE CASE AT BAR.

The decision of the court below is in conflict with all other circuits on all four of the questions presented for review by the case at bar. On all four questions, two or more courts have decided the same important legal issue in opposite ways.

First, and most important, on the important federal question of whether the courts of the United States may issue decisions that are outside the legal system of precedents, there is a split between the Eighth Circuit and the Ninth. The Eighth Circuit has followed Blackstone and held that we are still a common-law country and that precedents that are not admitted to be precedents are unconstitutional.

Anastasoff v. U.S., 223 F.3d 900 (8th Cir. 2000) (Arnold, J.).[4] The Tenth Circuit in the case at bar, on the other hand, has *sub silentio* followed the Ninth Circuit, which has explicitly rejected *Anastasoff* on all points. *In Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001) (Kozinski, J.), the most articulate statement in support of the "unpublishing system," the Ninth Circuit holds that (a) the unpublishing system is legal because Article III imposes no legal limits, because the Framers were "unclear." And (b), although unpublished opinions are admittedly less than "fully intelligible," still it is necessary to sacrifice the large majority of cases to give judges more time to improve the small minority, which are more important.

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[4]Although *Anastasoff* was vacated as moot after the IRS changed its position re Faye Anastasoff's request for a refund, at least two sub-sequent published opinions follow *Anastasoff*. See U.S. v. Goldman, 228 F.3d 942 (8th Cir. 2001) and U. S. v. Langmade, 236 F.3d 931 (8th Cir. 2001) (*per curiam*), which holds that "unpublished" decisions are binding precedent that district courts must follow.

These two opposite cases are the leading opinions on the most important question presented by the case at bar. If *Anastasoff* (2000) were discredited, Judge Kozinski would not have decided that his opinion in *Hart* (2001) is necessary. Although this conflict between circuits is not widespread and, like many important conflicts, could (and should) have been developed further, it nonetheless is current and very much a live issue. There are compelling reasons for invoking this Court's jurisdiction. It is the kind of question that can be decided only by the Supreme Court.

Second, on the question of whether a majority partner who has been held by a court of law to have (a) drafted and used "severely deficient" documents in a self-serving disputed transaction with minority partners, (b) shown "a general lack of credibility," or (c) come to court with "unclean hands" has fulfilled

the duties of a managing partner under the Uniform Partnership Act, the court below is again alone. (And the case at bar involves all three negative findings of fact about Respondents at the same time.) All other circuits and district courts in those circuits (and all State courts) follow *NCAS Realty Management Corp.*, 143 F.3d 38 (2nd Cir. 1998), which is exactly on point, or cases in the same line.

Third, regarding the question of what kind of "accounting" is required by the Uniform Partnership Act, the 10th Circuit is alone in holding that the mandatory accounting provision of the Uniform Partnership Act to protect minority partners is fully satisfied when the minority partner in a disputed transaction is allowed to sit in court to listen to the disputed, hostile testimony of a professional witness with whom he has never spoken, who was chosen

over his objections, and who was paid for his testimony only by the managing partner.

Fourth, the court below is alone in holding that an equitable remedy may be awarded to a party that is currently found by a court of law to have come to court with "unclean hands." The court below affirms the finding of "unclean hands" and simultaneously affirms the award of an equitable remedy to the unclean party. The stated reason for this decision of the court below is that, "In particular, we note that this argument was apparently not raised before the district court." Of course it was not raised there. Petitioners cannot raise the question of the contradictory nature of the district court's opinion before that opinion is entered. The court below was able to find no precedent for how it ruled on this question. That is because there is no precedent for what the court below did. (But under

the "unpublication system," courts are no longer bound by precedents.)

On all four questions presented by the case at bar, there is a clear, square, and irreconcilable conflict between the court below and all other circuit courts of appeal.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision of the court below, because it ignores State law in a diversity case, is inconsistent with *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), which holds that the courts of the United States must use State law as the rules for decisions in diversity cases. The alternative to granting this petition is to allow blatant federal-court nullification of State law, which this court historically has not permitted. *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996) (citing *Erie* and summarily reversing the 10th Circuit's misinterpretation of State law).

III. THE DECISION BELOW IS ERRONEOUS IN THREE RESPECTS.

The 10th Circuit wisely does not want the radical weakening of the UPA that it permitted in the case at bar to become a precedent, because the decision is wrong in three respects:

(1) The precedent set in the case at bar would have a chilling effect on partnership formation, which is a mainstay of the economy. No one who has read the 10th Circuit's decision in the case at bar, to the extent it is a precedent (and it is even though they say it is not), would ever choose to become a minority partner in any business. Even if we say that the opinion below is not legal precedent, still it is available in Lexis, Westlaw, and West's *Federal Ap-pendix* for all to see that the 10th Circuit court of appeals allows practically unrestricted open hunting

season on minority partners in Colorado, Kansas, Utah, Oklahoma, New Mexico, and Wyoming.

(2) The 10th Circuit's weakening of the UPA is either very difficult or impossible to reconcile with the wording and intent of the UPA, and it is revealing that the courts below do not attempt to do so. They do not attempt to distinguish the case at bar from *NCAS Realty,* because they cannot do so. They just ignore *NCAS Realty* and thus avoid the problem. That is what unpublished opinions are for.

Perhaps the authors of the opinion below also believe, because they have avoided the problem and said nothing about the precedents they ignored, that what they did is insulated from review by this Court. It is not. But this kind of gaming is very bad for the legal system.

(3) The district court's opinion is self-contradictory. The court finds Respondents, on the

one hand, "severely deficient," "lacking in credibility," and "unclean" and then, on the other hand, awards to them that which can be awarded only to those who have met the burden of proving that they have fulfilled their statutory high duty to act as trustees toward their minority partners. That is just not logically possible. The Respondents cannot be "not A" therefore "A." They have to be one or the other.

The court below is correct that its precedent cannot and should not be "published."

IV. ALL JUDICIAL DECISIONS THAT ARE NOT LEGAL PRECEDENTS ARE UNCONSTITUTIONAL UNDER ARTICLE III.

The most important problem with the "un-publishing system" is not a practical one. The most important problem is that it is irreconcilable with Article III of the Constitution of the United States.

Article III delegates "[t]he judicial power," and nothing more, to the courts of the United States. Like most of the terms used in the Constitution (such as "habeas corpus," "felony," and "bill of attainder"), "the judicial power" is not further defined in the text. But it does not follow that whatever a judge does that is powerful is "judicial power." When a term is used in the Constitution that is not defined in the text, then its meaning is assumed and incorporated from received

jurisprudence--from the body of the common law as it stood when the Constitution was drafted in 1789.

> The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when The law was made . . . .
>
> ---1 William Blackstone, *Commentaries (1765)* 59 (1979).

In the words of Justice Scalia, the fairest and most rational method . . .

> treats a constitution like a statute, and gives it the meaning that its words were understood to bear at the time they were promulgated . . . , the fairly understood meaning of those words. -
>
> ---Antonin Scalia, "A Theory of Constitutional Interpretation," Speech at Catholic University of America (October 18, 1996).

To understand the Constitution, one must understand that the oracle of the common law in 1789 in America as well as in England was William Blackstone's *Commentaries on the Laws of England* (1st ed. 1765). For the Framers, the importance of

Judge Blackstone as the interpreter of the common law is difficult to overestimate. See, for example, *Schick v. United States*, 195 U.S. 65, 69 (1904), says:

> Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law . . . . At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England, so that undoubtedly, the framers of the Constitution were familiar with it."[5]

The well-established, even unchallenged, common-law understanding of "the judicial power" in 1789 was that adherence to precedents is at the very core of what it means to be "judicial" and is what distinguishes "the judicial power" from the "the legisla-

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[5]See also R. Stone, "'We Inherit and Old Gothic Castle': Review of Blackstone's *Commentaries on the Laws of England* (1st ed. 1765, University of Chicago ed. 1979)," 8 *Hastings Constitutional Law Quarterly* 923 (Summer 1981); Herbert Storing, "William Blackstone," in *History of Political Philosophy* 622-634 (Leo Strauss and Joseph Cropsey eds., 3d ed. 1987); and Daniel Boorstin, "Introduction," *The Mysterious Science of Law: an Essay on Blackstone's Commentaries* 3-8 (1941).

tive power," which does not have to follow precedents. According to Blackstone, for all judges, "It is an established rule to abide by former precedents." *Commentaries* 69. The doctrine of precedent was well-established by the time the Framers gathered in Philadelphia.[6]

There are two reasons why "the judicial power" requires adherence to precedents (until those precedents are carefully distinguished). First, inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law, which must be applied in subsequent similar cases. *Anastasoff v. I.R.S.*, 223 F.3d 898, 900 (Arnold, J.). For Blackstone, each judge exercises only the "judicial power, which is to examine the truth of the

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[6]Morton J. Horwitz, Transformation of American Law 8-9 (1977) "The equation of common law with a fixed, customary standard meant that judges conceived their role as merely that of discovering and applying preexisting legal rules . . . . The result of all this was a strict conception of precedent." Horwitz, *Transformation* at 8.

fact, [and] to determine the law arising upon that fact." 3 Blackstone, *Commentaries* 25. And "to determine the law" means not only choosing the appropriate legal principle but also expounding and interpreting it, so that . . .

> the law in that case, being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiment . . . ."
>
> ---1 Blackstone, *Commentaries* 69.

The judicial power to determine law is a power only to determine what the law is, not to invent it. Because precedents are the "principal and most authoritative" guide to what the law is, the judicial power is limited by them. *Id.*

Blackstone was by no means unusual in deducing the legal system of precedents from the law-declaring nature of the judicial power. All

Anglo-American judges and students of the law were in agreement on this essential point. The doctrine that the system of precedents is derived from the law-declaring nature of the judicial power itself was familiar to the Framers also through the works of Sir Edward Coke, the author of a series of treatises published in four volumes as *The Institutes of the Law of England* (1628-1642),[7] which are foundational documents of the common law. Coke was the most admired and cited legal authority during the American Revolution.[8] The Framers identified Coke's struggle against the tyranny of the Stuarts with their own against King George. Coke emphasized precedent because it was his main

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[7]Coke's Institutes have been cited as authoritative by this Court in more than 70 cases, including *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), on the significance of "quickening," and in the Sugar Trust Case, *U.S. v. E. C. Knight Co.*, 156 U.S. 1, 15 S.Ct. 249, 39 L.Ed. 325 (1895) on the definition of monopoly.

[8] Bernard Bailyn, *The Ideological Origins of the American Revolution* 30 (1967).

weapon in the fight for the independence of the judiciary and to limit the king's prerogative rights.[9]

Coke tells us that a prior judicial decision on point is sufficient authority on a question of law because "a judicial decision is to the same extent a declaration of the law."[10] And . . . ,

> It is the function of a judge not to make, but to declare the law, according to the golden mete-wand of the law and not by the crooked cord of discretion."[11]

Likewise, Sir Matthew Hale agrees:

> Judicial Decisions do bind [and have their] Authority in Expounding, Declaring, and Publishing what the Law of this Kingdom is . . . ."[12]

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[9] J.G.A. Pocock, *The Ancient Constitution and the Feudal Law* 46 (1987).

[10] 4 Edward Coke, *Institutes of the Laws of England 138* (1642).

[11] 1 Coke, *Institutes* 51 (1628).

[12] Hale, *The History of The Common Law of England* 45.

The second reason why the "judicial power" necessary implies adherence to precedent is that it is essential, according to Blackstone, for the separation of legislative and judicial power. Blackstone teaches that the separation of powers is "one main preservative of the public liberty," and that the principal difference between the legislative power and "the judicial power" is a different attitude to precedent, "which, though "legislators may depart from, yet judges are bound to observe."[13] If judges had the legislative power to "depart from" established legal principles,

> the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions , and not by any fundamental principles of law . . . ," [14]

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[13]1 Blackstone, *Commentaries* 259.

[14]Id.

as in the case at bar. In the words of Justice Scalia again,

> If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted. The Executive, for example, in addition to "taking Care that the Laws be faithfully executed," Art. II, § 3, has no power to bind private conduct in areas not specifically committed to his control by Constitution or statute; such a perception of "the Executive power" may be familiar to other legal systems, but is alien to our own. So also, I think, "the judicial Power of the United States" conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common-law tradition.
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> --*James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, Marshall, Blackmun, JJ., concurring)

No American legal thinker and no American court of law opposed Blackstone on this very important understanding of the judicial power.

That the Framers of the Constitution of the United States agreed with their mentors on the nature of the judicial power---and the doctrine of precedent implicit in it---is a necessary inference from the text of the Constitution, but it is more than that also. They wrote clearly on the subject. Alexander Hamilton, in "The Federalist No. 81," argues that a court, to the extent it is exercising the judicial power, "pronounces the law" rising upon the facts of each case. He explains the law-declaring concept of judicial power with the word "jurisdiction": "This word is composed of JUS and DICTIO, *juris dictio*, or a speaking and pronouncing of the law." *Ib.* Following Blackstone, Hamilton writes that "[t]he courts must declare the sense of the law," and that this fact means courts must exercise "judgment" about what the law is rather than "will" about what it should be. "The Federalist

No. 78," 232-32. Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them . . . ." *Id.*

And Hamilton, again following Blackstone, discusses in "The Federalist No. 78" the importance of the separation of powers. "There is no liberty, if the power of judging be not separated from the legislative [power]." "The Federalist No. 78," 230. The principal difference between the two powers is that judges must follow precedents:

> To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived . . . that the records of those precedents must unavoidably swell to a very considerable bulk, and must

> demand long and laborious study to acquire a competent knowledge of them. Hence it is, that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges.
>
> ---"The Federalist No. 78," *American State Papers* 233

Chief Justice Roberts, during his confirmation hearings, when asked about the nature of precedent, replied by citing Hamilton as the authoritative interpreter of Article III:

> As Alexander Hamilton explained in *Federalist No. 78*: 'To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.
>
> ---Letter from Judge John Roberts to Sen. Arlen Specter, Senate Judiciary Committee (September 21, 2005)

And Justice Alito similarly invoked Hamilton's *Federalist No. 78* during his own confirmation process:

> In all the areas that you mentioned, there is now a considerable body of case law, and that is a real limitation on the exercise of judicial power. That is one of the important reasons for the doctrine of *stare decisis*. In the *78th Federalist Paper*, when Alexander Hamilton was responding to the people who were worried about this power of judicial review, who thought that it would give the judiciary too much power, he specifically cited the fact that members of the judiciary would be bound up by precedent, and this would restrain them. This would keep them from injecting their own views into the decision-making process.
>
> ---Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing before the Committee on the Judiciary, 109th Cong. 526 (2006).

Likewise, James Madison, the "Father of the Constitution," recognizes "the obligation arising from

judicial expositions of the law on succeeding judges."[15] Madison, following Blackstone, sees the legal system of precedents as a principal safe-guard against tyranny. Madison expects that the accumulation of precedents would be beneficial: "Among other difficulties, the exposition of the Constitution is frequently a copious source, and must continue so until its meaning on all great points shall have been settled by precedents."[16]

Likewise, James Wilson, a prominent scholar of law among the Framers, a delegate to the Constitutional Convention, and one of the six original justices of the Supreme Court, follows Blackstone:

> Judicial decisions are the principal and most authentic evidence, which can be

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[15] "Letter from Madison to Charles Jared Ingersoll (June 25, 1831)."

[16] "Letter to Samuel Johnson" (June 21, 1789).

> given,[of what the law is.] "As such, every prudent and cautious judge will appreciate them . . . . He will remember, that his duty and his business, is not to make the law, but to interpret and apply it." [17]

Likewise, Chancellor Kent, who developed the law of equity in the United States, follows Blackstone.

> Adjudged cases become precedents for future cases resting upon analogous facts, and brought within the same reason . . . .[18]

Justices Scalia, Stevens, Thomas, and Breyer elaborate:

> The near-dispositive strength Blackstone accorded *stare decisis* was not some mere personal predilection. Chancellor Kent was of the same view: "If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have *a right* to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by

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[17] 2 *The Works of James Wilson* 502 (1967).

[18] James Kent, Lect. XXI, "Of Reports of Judicial Decisions," 1 *Commentaries on American Law* 440-441.

> it." 1 J. Kent, *Commentaries* 475-476 (emphasis added). See also Hamilton's statement in The Federalist: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." *The Federalist No. 78*, p. 471 (C. Rossiter ed. 1961).
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> ---*Rogers v. Tennessee*, 532 U.S. 451, 473, n. 2 (2001) (dissenting)

In the words of Judge Richard Arnold,

> To summarize, in the late eighteenth century, the doctrine of precedent was well-established in legal practice (despite the absence of a reporting system), regarded as an immemorial custom, and valued for its role in past struggles for liberty. The duty of courts to follow their prior decisions was understood to derive from the nature of the judicial power itself and to separate it from a dangerous union with the legislative power. The statements of the Framers indicate an understanding and acceptance of these principles. We conclude therefore that, as the Framers intended, the doctrine of precedent limits the "judicial power" delegated to the courts in Article III.
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> ---*Anastasoff v. U.S.*, 223 F.3d 898, 903 (8th Cir. 2000) (Arnold, J.), *moot on other grounds*, 235 F.3d 1054

V. ALL JUDICIAL DECISIONS THAT ARE NOT LEGAL PRECEDENTS ARE UNCONSTITUTIONAL UNDER THE DUE-PROCESS CLAUSE.

The Fifth Amendment to the Constitution of the United States provides that: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. Judicial decisions that are paradoxically not admitted to be legal precedents violate the legal principle of *stare decisis*. The doctrine of *stare decisis* is the hallmark of a system of laws. *Ex Parte Bollman*, 8 U.S. [4 Cranch] 75, 41-92 (1807)

The right to a fair trial, as embodied in the requirement that courts should be bound to rely upon prior decisions (or to distinguish them or change the law), is a "fundamental right" and "basic value" "implicit in the concept of ordered liberty" as set forth in the Constitution and intrinsic to our judicial

system. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring). And, "classifications affecting fundamental rights are given the most exacting scrutiny" *Clark v. Jeter*, 486 U.S. 456, 461 (1988). The expedient of issuing decisions that are outside the legal system of precedents infringes upon a fundamental right and must, therefore, be subject to strict scrutiny and justified by showing that the action is the least-burdensome means of achieving a compelling interest. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted . . . , classifications which might invade or restrain them must be closely scrutinized and carefully confined.") The practice of declaring opinions in advance to hold no weight as precedents is not the least burdensome means of achieving any compelling state interest. David R.

Cleveland, "Overturning the Last Stone: the Final Step in Returning Precedential Status to All Opinions" 10 *J. App. Practice and Process* 61, 155.

This Court's case law under the Due Process Clause makes clear that there is a "duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions" and that this requirement serves "not only to ensure abstract fair play to the individual" but also "[i]t's purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property." *Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

Likewise, this Court has a long history of protecting deeply rooted common-law judicial procedures, often finding that abrogation of these procedures violates litigants' due-process rights. For

example, in a parallel case, *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), this Court held that denying a well-established common-law procedure was a violation of due process. In that case, this Court ruled that judicial oversight of punitive-damage verdicts remained a part of common law from 1763 to the present. *Id.*, at 421-29. And, therefore, Oregon's statute denying remitter violated due process. *Id.*, at 430. The common-law practice of referring to past cases as establishing the governing law stretches back much further and is of far more fundamental importance to the integrity of the American legal system than is judicial oversight of punitive-damage awards. Lance A. Wade, Note, "*Honda* Meets *Anastasoff*: The Procedural Due Process Argument against Rules Prohibiting Citation to Unpublished Judicial Decisions," 42 *B. C. L. Rev.*, 695, 723-32 (2001).

VI. ALL JUDICIAL DECISIONS THAT ARE NOT LEGAL PRECEDENTS ARE UNCONSTITUTIONAL UNDER THE DOCTRINE OF EQUAL PROTECTION.

This Court has made clear that there is an equal-protection component to the Due Process Clauses of the Constitution.[19] It is a fundamental purpose of a legal system to provide predictability. The definition of predictability is "equality for equals, inequality for unequals,"[20] i.e. similarly situated litigants will be treated the same way. A government that aspires to have a legal system must at least aspire to predictability. A government that permits judicial decisions that are not admitted to be precedents has abandoned that aspiration.

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[19]See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Jimenez v. Weinberger*, 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974).

[20]"Justice is equality, but only for equals; and justice is inequality, but only for those who are unequal." Aristotle, "The Politics" 1282b, 9 *Great Books of the Western World* (1952) 480.

The new attitude is apparent in a pair of recent Cases in which the Dallas Area Rapid Transit authority (DART) received diametrically opposed decisions from the Fifth Circuit without explanation in a span of just three years. In 1998 in *Anderson v. DART*, the district court for the Northern District of Texas held that "DART is a political subdivision of the State of Texas, and is therefore immune under the Eleventh Amendment from lawsuits,"[21] and the Fifth Circuit affirmed---in an unpublished opinion. When the Supreme Court denied *certiorari* in this case, DART must have felt about as secure as possible that the rule was settled. Yet when the district court applied this rule again in the year 2000, in *Williams v. DART*, this time the Fifth

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[21] *Anderson v. Dallas Area Rapid Transit*, No. CA3:97-CV-1834-BC, 1998 U.S. Dist. LEXIS 15493, at *24 (N.D. Tex. Sept. 29, 1998), *aff'd* per curiam, *Anderson v. DART*, 180 F.3d 265 (5th Cir. 1999) (*per curiam*) (unpublished), *cert. denied*, 528 U.S. 1062 (1999).

Circuit held that DART was not immune under the Eleventh Amendment from lawsuits.[22] The Fifth Circuit in *Williams* was wholly dismissive of the prior result in *Anderson* and in two similar cases.[23] So, only because the prior case, which held that DART is immune, was "unpublished," it was not accorded precedential weight, and the court felt free to depart from it without distinguishing it in some fashion (which it could not do because the legally relevant facts were identical)---or even overruling the law on which the case was based.[24] (In the case at bar, the circuit court did not attempt to distinguish the precedents on point under the Uniform Partnership Act cited above, such as *NCAS*

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[22] *Williams v. DART*, 242 F.3d 315, 318-19 (5th Cir. 2001).

[23] "Although all three cases upheld DART's immunity from suit, they are neither binding nor persuasive in this context." *Williams v. DART*, 242 F.3d at 319 (5th Cir. 2001).

[24] *Williams*, 242 F.3d at 322.

Realty Management Corp., 143 F.3d 38 [2nd Cir. 1998] and did not attempt to overrule them.) Two identical cases decided within two years were decided differently based not on factually distinguishable factors or a change in the governing law, but merely the whim of one panel choosing not to publish. Not only was the defendant similarly situated in each case, but also as far as legally relevant facts go, it was *identically* situated. As Judges Smith, Jones, and DeMoss wrote in their vigorous dissent,

> What is the hapless litigant or attorney, or for that matter a federal district judge or magistrate judge, to do?[25]

What happened to DART and the Petitioners in the case at bar are not isolated examples. In fact, they may be common.

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[25] *Williams*, 256 F.3d at 261.

> "Empirical evidence suggests that cases such as . . . *Anderson* are more common than one might think."[26]

"Lord Mansfield frequently observed, that the certainty of a rule was often of much more importance in mercantile cases than the reason of it." 1 Kent, *Commentaries* 444. In the case at bar, Petitioners relied on the settled law of partnerships exemplified by *NCAS Realty Management Corp.*, 143 F.3d 38 (2nd Cir. 1998), when they entered into, and then remained in, a partnership with the Respondents. If Petitioners could have known in advance that the Tenth Circuit would later declare open season on minority partners, they would easily have adapted and chosen a different investment vehicle.

In sum, the practice of designating some opinions as outside the legal system of precedents

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[26] *Williams*, 256 F.3d at 262.

violates the doctrine of equal protection because, on its face, it fails to treat equals equally. This unequal treatment inhibits a fundamental right, and the government's pragmatic justifications for the practice are insufficient to meet the "strict scrutiny" standard required by this Court in cases of violations of fundamental rights.

VII. DECISIONS THAT ARE NOT LEGAL PRECEDENTS TEND TO BE SUB-STANDARD AND TO HAVE THE APPEARANCE OF IMPROPRIETY.

Justice John Paul Stevens, the most outspoken and most principled living judicial opponent of the "unpublication system," spoke to the Illinois State Bar Association[27] about the problem in 1976, when that system had just begun:

> A rule which authorizes any court to censor the future citation of its own opinions or orders rests on a false premise. Such a rule assumes that an author is a reliable judge of the quality and importance of his own work product. If I need authority to demonstrate the invalidity of that assumption, I refer you to a citizen of Illinois who gave a brief talk in Gettysburg, Pennsylvania, that he did not expect to be long remembered. Judges are the last persons who should be authorized to determine which of their decisions should be long remembered.[28]

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[27] See David R. Cleveland, "Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System," 92 *Marquette L. R.* 685.

[28] Remarks at the Illinois State Bar Association's Centennial Dinner (January 22, 1977), quoted in "Brief for the Chicago Council of

Justice Stevens has spoken out early and often about the dangers of issuing precedents that are not admitted to be precedents.

> Q: Is the decision to grant or deny cert. influenced by whether the opinion from the court below is a published or nonpublished opinion?
>
> A: [Justice Stevens]: Well, I tend to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.
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> ---Jeffrey Cole and Elaine E. Bucklo, "A Life Well Lived: An Interview with Justice John Paul Stevens," 32 *Litig.* 8, 67 (2006).

Not only are "unpublished" opinions used when the decision is "a little hard to justify." Also, the "unpublication system" invites gaming of the system by circuit-court judges. One obvious concern is that the courts of appeal can use unpublication to

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Lawyers as Amicus Curiae Supporting Petitioner at 3, *Browder*, 434 U.S. 257 (No. 76-5325), 1977 WL 189280.

insulate their decisions from review by this Court. Several circuit-court judges have written about their first-hand observations of misuse of unpublished opinions. See Patricia M. Wald, "The Rhetoric of Results and the Results of Rhetoric: Judicial Writings," 62 *U. Chi. L. R.* 1371, 1374 (1995) (discussing her observations as a judge on the D.C. Circuit); and Richard S. Arnold, "Unpublished Opinions: A Comment," 1 *J. of App. Prac. and Proc.* 219, 219 n. 1 (1999) (discussing his observations as a judge of the Eighth Circuit).

Justice Ginsburg has warned us that "[a] limited publication rule, however sensible its purpose, is susceptible of misuse." The abuse she had in mind was that a judge or panel might "resort to an unpublished, abbreviated disposition to conceal or avoid a troublesome issue" (as in the case at bar). Ruth Bader Ginsburg, "The Obligation to Reason

Why," 37 *U. Flor. L. Rev.* 205, 222 (1985). Another kind of abuse is that courts of appeal can use the unpublishing system to protect themselves from review by this Court.

Several justices of this Court have expressed deep concern over the relentlessly increasing number of "unpublished" decisions that are not admitted to be precedents. (The proportion has now reached a staggering 84%.)

> In ever-increasing numbers, appeals throughout the federal system are being decided in this anonymous fashion. It is not uncommon for courts of appeals to issue opinions that are not to be cited as authority in other cases. In one recent published case---which was sufficiently important to induce this Court to grant certiorari even before a conflict in the circuits had developed—the court purported to justify such an *ad hoc* adjudication by asserting that it lacked "precedential character." The threat to the quality of our work that is presented by the ever-increasing impersonalization and bureaucratization of the federal

> judicial system is far more serious than is generally recognized.
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> ---*Bd. of Educ. v. McCluskey*, 458 U.S. 966, 972 (1982) (Stevens, J., dissent, joined Brennan and Marshall, JJ's) (reproaching the Second Circuit over its recent use of an unpublished decision in *Rowley v. Board of Ed.*, 632 F.2d 945, 948, n. 7 (2d Cir. 1980), *rev'd*, 458 U.S. 176 (1982)

One six-month study of cases in the D. C. Circuit found that forty percent of unpublished cases arguably met the publications standards, and Judge Wald of that court indicates that the proportion is now higher. Why? In her words, "[A] double-track system allows for deviousness and abuse." Patricia M. Wald, *supra*, 62 *University of Chicago Law Review* 1371, 1374 (1995).

A sea change in the American legal system has occurred without consideration by the Supreme

Court. "How did we get here? Where are we going?," asks Justice Alito.[29] A chorus of concerned voices has been raised in the legal community about the propriety of the change.[30]

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[29]Justice Samuel A. Alito, "How Did We Get Here? Where Are We Going?," Keynote Address at Washington and Lee University School of Law, Law Review Symposium: "Have We Ceased to Be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn, and *Per Curiam* Opinions," SSA-017109 (March 18, 2005), available at http://www.law.com/pdf/dc/ alito_unpublished.pdf.

[30]For example: Pamela Foa, Comment, "A Snake in the Path of the Law: the Seventh Circuit's Non-Publication Rule," *University of Pittsburgh Law Review* 309 (1977); W. Richman and W. Reynolds, "Elitism, Expediency, and the New *Certiorari*: Requiem for the Learned Hand Tradition," 81 *Cornell L. Rev.* 273, 284 (1996); Tony Mauro, "Stealth Decisions under Fire," *Legal Times* (September 4, 2000); Jennifer Adams, Comment, "Law Today: Gone Tomorrow," 53 *Baylor Law Review* 659 (2001); Thomas Healy, "*Stare Decisis* as a Constitutional Requirement," 104 *West Virginia Law Review* 43 (2001); Deborah Jones Merritt and James J. Brudney, "Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals," 54 *Vanderbilt Law Review* 71 (2001); William J. Miller, Note, "Chipping away at the Dam: *Anastasoff v. United States* and the Future of Unpublished Opinions in the United States Courts of Appeals and Beyond," 50 *Drake Law Review* 181 (2001); Sheree L. K. Nitta, Note, "The Price of Precedent: *Anastasoff v. United States*," 23 *Hawaii Law Review* 795 (2001); Suzanne O. Snowden, "That's My Holding and I'm Not Sticking to it!: Court Rules that Deprive Unpublished Opinions of Precedential Authority Distort the Common Law," 79 *Washington University Law Quarterly* 1253 (2001); Jon A. Strongman, Comment: "Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional," 50 *University of Kansas Law Review* 195 (2001); Lance A. Wade, Note, "*Honda* Meets *Anastasoff*: the Procedural Due Process Argument against Rules Prohibiting Citation to Unpublished Judicial Decisions," 42 *Boston College Law Review* 695 (2001); Stephen R. Barnett, "From *Anastasoff*

Another point about the practicalities of the matter needs to be made. It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. Indeed, one must feel sympathy for the appellate-court judges who only recently in our

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to *Hart* to West's *Federal Appendix*: The Ground Shifts under No-Citation Rules," 4 *Journal of Appellate Practice and Process* 1, 1-2 (2002); Charles R. Eloshway, "Say It Ain't So: Non-Precedential Opinions Exceed the Limits of Article III Powers," 70 *George Washington Law Review* 632 (2002); Kenneth Anthony Larett, "Precedent, Judicial Power, and the Constitutionality of 'No-Citation' Rules in the Federal Courts of Appeals," 54 *Stanford Law Review* 1037 (2002); Johanna S. Schiavoni, "Who's Afraid of Precedent?: the Debate over the Precedential Value of Unpublished Opinions," 49 *UCLA Law Review* 1859 (2002); Steve Sheppard, "The Unpublished Opinion: How Richard Arnold's *Anastasoff* Opinion is Saving America's Courts from Themselves," 2002 *Arkansas Legal Notes* 85 (2002); Richard B. Cappalli, "The Common Law's Case against Non-Precedential Opinions," 76 *Southern California Law Review* 755 (2003); Michael B.W. Sinclair, "*Anastasoff* versus *Hart*: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions," 64 *University of Pittsburgh Law Review* 695 (2003); Tony Mauro, "Unpublished Opinions: Inedible Sausage or Crazy Uncle?, *Legal Times* (April 12, 2004); Penelope Pether, "Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts," 56 *Stanford Law Review* 1435 (2004); Penelope Pether, "Take a Letter, Your Honor: Outing the Judicial Epistemology of *Hart v. Massanari*," 62 *Washington and Lee Law Review* 1553, 1557 (2005); Erica S. Weinberger, "Unpublished Opinions: A Convenient Means to an Unconstitutional End," 97 *The Georgetown Law Journal* 621-655 (2009); David R. Cleveland, "Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions," 10 *Journal of Appellate Practice and Process* 61 (2009); and David R. Cleveland, "Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System," 92 *Marquette Law Review* 686 (2009).

history, and against their wishes, feel compelled to disregard Constitutional mandates and citizens' rights because of unduly high judicial case loads and pressures of time. The return to the Constitution requested in the case at bar should be the occasion for a concerted appeal for greater Congressional funding of the judiciary and the appointment of additional federal judges.

> We do not have time to do a decent enough job, the argument runs, when put into plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.
>
> ---*Anastasoff v. U.S.*, 223 F.3d 900, 904 (8th Cir. 2000)

The price must still be paid. As Laurence Tribe, the famous constitutional-law scholar and opponent of

the unpublication system, has noted, "[t]he Constitution cannot be cabined in any calculus of costs and benefits."[31]

In sum, the "ever-increasing number" of "unpublished" decisions comprise a large and fast-growing majority of all decisions issued by the courts of appeal, and such decisions have been described by respected legal authorities as "resting on a false premise," unprecedented, ill-justified, "impersonal," "bureaucratic," "a threat to the quality of our work," "susceptible of misuse," "allowing deviousness and abuse" and unconstitutional. They are, as in the case at bar, "a device to reach a decision that might be a little hard to justify" and are used "to conceal or avoid a troublesome issue." If so, the entire federal judicial system "is indeed in serious trouble."

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[31] Laurence H. Tribe, "Constitutional Calculus: Equal Justice or Economic Efficiency?," 98 *Harvard Law Review* 592, 592 (1984).

VIII. THE MAIN QUESTION PRESENTED BY THE CASE AT BAR IS TOO IMPORTANT TO BE DECIDED BY A LOWER COURT.

Petitioners have argued that the case at bar represents a conflict between circuits on all four questions presented. But even if there were no split at all among the circuits and all of the courts of appeal are employing the expedient questioned in this Petition, this Court's Rule 10(c) provides for granting a petition for certiorari in cases that present issues of national importance, for which there are compelling reasons for invoking this Court's jurisdiction.

> [T]he Court considers [whether] . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court . . . .

The main question presented by the case at bar is the constitutionality of the expedient of issuing pre-

cedents that are paradoxically not admitted to be precedents, that are outside the Anglo-American legal system of precedents. This question so far has been decided in the Tenth Circuit by a three-judge panel, as it denied a motion for rehearing---without giving a single reason, authority, or precedent for its decision. This question recurs in all circuit courts on a daily basis, in fact many times each day. It is obvious that this question is an important federal question, an issue of national importance (in fact, a national scandal), for which there are compelling reasons for invoking this Court's jurisdiction. This Court has not yet ruled on it.

Petitioners in the case at bar informally but in effect represent 84 percent of all litigants in all federal courts. The case at bar is in effect a class action, with Petitioners representing tremendously important principles, upon which are based the

plans, hope, and aspirations of a great many people throughout this country. The case at bar is nothing less than the most important procedural case that has come before this Court since *Erie v. Tompkins* in 1938.

CONCLUSION

THEREFORE, for all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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(1)

Supreme Court, U.S.
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In The
Supreme Court of the United States

The Children's Fund et al.,
Petitioners,

v.

Springfield Holding Co. Ltd. LLC et al,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

APPENDICES

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Case: 08-6210 Document: 01018079018 Date Filed: 06/08/2009

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SPRINGFIELD HOLDING COMPANY LTD LLC, Plaintiff – Appellee, and MARK W. REINITZ; ROGER L. KINNARD; DAVID H. KINNARD, Plaintiffs-Counter-Defendants-Appellees,

No. 08-6210
(D.C. No. 07-CV-00250-R)
(W.D. Okla.)

v.

ROBERT STONE, M.D.; THE CHILDREN'S FUND, an Illinois limited liability company; ROBERT L. STONE, a/k/a Robert L. Stone the II; CYNTHIA A. STONE, Defendants-Counter-Claimants -Appellants.

ORDER AND JUDGMENT*

Before **KELLY**, **LUCERO**, and **HARTZ**, Circuit Judges.

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*This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for it s persuasive value consistent with Fed.R.App.P. 32.1 and 10th Cir. R. 32.1.

Defendants-Counter-Claimants-Appellants—Robert L. Stone, Cynthia A. Stone, Robert Stone, M.D., and The Children's Fund (referred to collectively as the Stones)—appeal the district court's judgment in favor of the Plaintiffs-Counter-Defendants-Appellees, David Kinnard, Roger Kinnard, Mark Reinitz, and Plaintiff-Appellee Springfield Holding Co. (referred to collectively as the Kinnards, given that the principal actors are David and Roger Kinnard). The primary issue on appeal is whether the district court erred in concluding that the Stones no longer maintain an ownership interest in a set of business entities in which they had previously held a minority interest. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, and affirm the district court's judgment.

Background

The present case arises from a complicated series of business transactions between the Stones and the Kinnard brothers, David and Roger, that turned sour. Because the district court set forth the confused tangle of transactions with as much clarity as is practicable, see Kinnard v. Stone, No. CIV-07-250-R, 2008 WL 4000445, at *1-5 (W.D. Okla. Aug. 25, 2008), we will not exhaustively recount the facts of the case here. A relatively cursory overview of the facts will suffice. Together, Robert L. Stone and the Kinnard brothers had formed a number of limited liability companies, partnerships, and other entities to manage their joint business ventures in rental real estate. These entities functioned under an "aggregator," the Oklahoma Investment Group ("OIG"). This "aggregator," which had virtually no assets, was used to run the day-to-day operations of

the various entities and receive and disburse money for each entity. OIG utilized a single bank account for the entities, although separate books and records were kept for each one. David Kinnard was the most active member of the investors, and he acted as the managing partner of OIG. Robert L. Stone was not an active participant in OIG's internal affairs, as he eventually moved to Chicago.

The problems that led to this litigation find their root in the agreement between David Kinnard and Robert L. Stone that the Stones would receive a monthly allowance or distribution of $17,000. These monthly payments continued from 1996 through 2005, though they apparently ceased for a period during 1999 for reasons that are disputed by the parties. The Stones contend that the payments were withheld as leverage in a dispute between the Stones and Kinnards over the distribution of proceeds from

a lawsuit (which the parties refer to as the "Beatrice litigation") against a third party not involved in this litigation. The Stones further claim that the Kinnards still owe them the arrearage that arose in 1999. On the other hand, the Kinnards maintain that the payments were merely advances on the Stones' distributive share of income from the various entities.[1]

The problems between the parties subsequently deepened when Robert L. Stone began to seek loans from the Kinnards. Mr. Stone sought a loan from the Kinnards in 2003, and David Kinnard agreed to grant him the requested money in exchange for an "assignment" of Stone's interest in one of the entities owned by the investors, Cinnamon

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[1]At the end of the year, to the extent that advances exceeded distributive net income, the excess was treated as an account receivable (a loan to the recipient). Aplt. App. 774-75, 1048-49.

Creek L.L.C. The nature of this exchange is also disputed; the Stones contend that it was a loan, while the Kinnards argue that it was a transfer of the Stones' ownership share with an accompanying right to repurchase. This was a critical transaction, because it set the precedent for the subsequent financial dealings between the Stones and the Kinnards. In any event, the Stones eventually reestablished their ownership interest in Cinnamon Creek by paying David Kinnard $130,000.

The transactions between the Stones and Kinnards then began to multiply. In 2004, Stone once again used his Cinnamon Creek interest to secure money from David Kinnard. Later in that year, in separate transactions, the Stones assigned to the Kinnards their interest in other entities, including Peppertree Partners, Inc., Peppertree Partners, Ltd., Windrock Associates, Summer

Pointe, and the Springfield Entities in exchange for cash. The Stones also apparently executed two promissory notes in relation to other disputed debts, and David Kinnard assumed those obligations as part of the transactions between the Stones and Kinnards. The Kinnards then evidently informed the Stones that no further money would be forthcoming, as they had concluded that the Stones had transferred all of their ownership interests in the various entities to the Kinnards.

The Kinnards initiated this litigation by bringing an action for declaratory judgment, seeking a declaration that the Stones no longer maintained an interest in any of the entities. The Stones counterclaimed, seeking a full accounting for each of the entities and a declaratory judgment that they did in fact still have an ownership interest in each of the entities. Accordingly, the central question posed

by these competing claims was whether the aforementioned transactions were loans or whether they were actually transfers of the Stones' ownership interest. Additional issues were also implicated, in that the Stones challenged the adequacy of the consideration the Kinnards paid for the Stones' ownership interest and contended that they were due a full accounting. Ultimately, the district court concluded that the Stones had sold all of their interests to David Kinnard for adequate consideration, and that they had received an adequate accounting. Kinnard, 2008 WL 4000445 at *7-10. The Stones now appeal the district court's judgment, raising several alleged errors on the part of the district court.

Discussion

We review the district court's findings of fact for clear error. Fed. R. Civ. P. 52(a)(6); La Resolana

Architects, PA v. Reno, Inc., 555 F.3d 1171, 1177 (10th Cir. 2009). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (citation omitted). If the district court's findings are plausible, we will not reverse. Id. at 573-74. Our review of questions of law, on the other hand, is de novo. La Resolana Architects, 555 F.3d at 1177. We review mixed questions of law and fact under either the clearly erroneous standard or the de novo standard, depending on whether the inquiry is primarily factual or legal. Hollern v. Wachovia Secs., Inc., 458 F.3d 1169, 1175 n.4 (10th Cir. 2006).

I. Sale of the Stones' Interests in the Business Entities

The Stones' first argument is that the district court erred by concluding that there was a valid contract for the sale of their ownership interest because, they con-tend, there was no meeting of the minds. The Stones correctly point out that as a matter of law there must be a meeting of the minds in order to form a contract.[2] Beck v. Reynolds, 903 P.2d 317, 319 (Okla. 1995). However, we review the question of whether there was actually a meeting of the minds for clear error, as it is a factual inquiry. See Homestead Golf Club, Inc. v. Pride Stables, 224 F.3d 1195, 1200 n.5 (10th Cir. 2000). Here, we cannot conclude that the district court clearly erred, given the factual record before us. The parties presented

[2] Both parties agree that Oklahoma law governs in this case.

conflicting evidence, which the district court resolved in favor of the Kinnards.

The most important piece of evidence supporting the district court's conclusion is the handling of the initial transaction relating to Cinnamon Creek. In 2003, Robert L. Stone sought a loan from David Kinnard, and in so doing proposed a document entitled "Assignment of Partnership Interest as Collateral for Note" offering his interest in Cinnamon Creek as collateral for a loan. ApleeSupp. App. 3. However, David Kinnard rejected this offer and the proposed document because he wanted outright ownership rather than a collateral interest. Having had his proposed loan arrangement rejected, Mr. Stone ultimately signed a document that he referred to as an "unconditional transfer of [his] partnership interest" in Cinnamon Creek. Aplee. Supp. App. 4. The instrument provided that Robert

L. Stone: hereby sells, assigns, transfers and conveys . . . all of his membership interests and other ownership interest of any kind in Cinnamon Creek, L.L.C., an Oklahoma limited liability company (the "Company"), and all rights appurtenant thereto, including but not limited to the right to receive distributions, profits or income of any kind from the Company. Aplt. Supp. App. 6. The attorney who drafted the document called it "an Assignment of Membership Interest" in an e-mail to the principal parties, referred to the "$100,000 sale price," and informed Mr. Stone that they were pre-paring an agreement whereby he could "repurchase his membership interest." Aplee.Supp.App. 5. Further, the evidence suggests that Mr. Stone was aware of the difference between the two documents when he inquired why the transaction was described "as a sale-redemption and not as a loan." Apll.Supp.App.

7. When Mr. Stone eventually repurchased his interest, David Kinnard advised him in writing that "[t]here is no loan. There is only an opportunity to buy back shares. Please read these docs carefully."[3] Aplee. Supp. App. 8. This sequence of events strongly suggests that the Stones attempted to secure a loan, but failed to do so; rather, they ultimately entered into a sale and buy-back agreement—and they apparently did so knowingly. This is of significance, given that the parties then proceeded to use the same unconditional transfer document in all the subsequent transactions.[4]

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[3]There is further evidence of the Stones' knowledge of the nature of the transaction into which they had entered. When Cynthia Stone assigned her interest in Summer Pointe using an identical unconditional transfer document, an OIG employee informed her that the assignment documented a sale, not security for a loan.

[4] The parties agree that identical documents were used for all the relevant transactions. However, they disagree as to whether the first transaction was a loan or a sale. Given our standard of review, we have no basis to reverse the district court's eminently reasonable conclusion that it was a sale.

In light of the documentary evidence and testimony, ample evidence supports the district court's finding/conclusion that the Stones knew they were selling their interests rather than merely utilizing their interests as security. To be sure, the Stones point to evidence which, if credited, might support their position. For instance, the Stones testified that they had "no idea" they were selling their interests, produced e-mails wherein the transactions were referred to as loans, and elicited testimony from the Kinnards that the Stones frequently referred to the transactions as "loans" in their communications. Further, they point to testimony to the effect that payments were "reclassified" as purchases after the fact. This testimony, they suggest, shows that there was no sale for an agreed-

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Accordingly, we cannot rely on this first transaction to show that the remainder were loans, as the Stones would have us do.

upon purchase price, even though the district court concluded there was a sale and found the amount of each purchase price based on testimony and exhibits entered into evidence. See Kinnard, 2008 WL 4000445, at *2-3.

"But pointing to conflicting evidence inconsistent with the district court's finding is insufficient, standing alone, to establish clear error . . . ." Penncro Assocs., Inc. v. Sprint Spectrum, L.P., 499 F.3d 1151, 1161 (10th Cir. 2007). This is necessarily so, given that "every trial is replete with conflicting evidence, and in a bench trial, it is the district court[] which enjoys the benefit of live testimony[,] . . . has the opportunity firsthand to weigh credibility and evidence, [and] has the task of sorting through and making sense of the parties' competing narratives." Watson v. United States, 485 F.3d 1100, 1108 (10th Cir. 2007). The district court has the discretion to

credit some individuals' testimony above that of others and weigh the competing evidence, as long as its conclusion is plausible. Anderson, 470 U.S. at 573-74. That is the very nature of the function of the district court in a bench trial, and we may not second-guess the district court's determinations absent clear error. Here, the district court had strong corroborating evidence suggesting that the hundreds of thousands of dollars received by the Stones were advances on distributions, rather than guaranteed payments, and that the Stones knowingly sold their interests to obtain cash. We find no clear error.

II. Adequacy of the Consideration Provided

The Stones next challenge the adequacy of the consideration they received for the sale of their ownership interests. In particular, they argue that

the district court erred by finding that David Kinnard paid valid consideration for the Stones' interests. According to the Stones, neither the forgiveness of the promissory notes executed by Robert L. Stone nor the funds borrowed by David Kinnard from the Spring-field Entities can serve as consideration. The Stones' challenge raises a mixed question of law and fact.

A. The Promissory Notes

There are two promissory notes at issue. The first was a $500,000 note executed on March 11, 2005, by Robert L. Stone to Bernice Kinnard, the mother of the Kinnard brothers. The record shows that the Stones had borrowed money from Mrs. Kinnard in the 1990s, and this promissory note memorialized the debt. The second promissory note was executed on March 16, 2005, by Robert L. Stone to Roger and David Kinnard for $250,000. This note

apparently stemmed from the dispute between the Stones and Kinnards over the proceeds from the Beatrice litigation. The Stones contend that the district court erred as a matter of law in finding these notes to be valid consideration because they were not "accepted," because they were not a detriment to David Kinnard, because they were executed after the final assignment of the Stones' interests, and because they were of un-certain value. None of these contentions, which actually involve a primarily factual inquiry, have merit.

First, the district court found as a matter of fact that David Kinnard "was assuming the debt, making him liable for payment to his mother" on the first promissory note, Kinnard, 2008 WL 4000445, at *3, and there is testimony sufficient to uphold the district court's conclusion on this point. Further, there is no evidence that the Kinnard brothers

somehow rejected the second promissory note relating to the Beatrice litigation. Accordingly, the Stones' argument that the promissory notes were not "accepted" misses the mark. Second, the first promissory note was a detriment to David Kinnard, because he was assuming the debt that Robert L. Stone admitted he owed to David Kinnard's mother. Accordingly, the Stones' argument is misguided insofar as they argue that David Kinnard merely attempted to forgive a note that was not his. Furthermore, the evidence supports the finding that the Kinnards forgave the second promissory note and can no longer enforce it against the Stones. This also constitutes a detriment and, hence, consideration. Finally, it is of little consequence here that the notes were executed subsequent to the final assignment of the Stones' interest; this fact does not render their value sufficiently uncertain such that

there was no detriment to the Kinnards or benefit to Robert L. Stone. Rather, while the notes were technically executed after the final assignment of the Stones' interest, it appears that these notes simply memorialized *pre-existing* debts which the Kinnards forgave or assumed as part of the assignments. This is sufficient under Oklahoma law. See Okla. Stat. tit. 15 § 106. See generally Taylor v. Taylor, 389 P.2d 622, 627-28 (Okla. 1964) (stating that a disputed claim is good consideration, even if that claim later is demonstrated to be unfounded). Accordingly, the district court properly treated the promissory notes as good consideration.[5]

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[5]In any event, we note that the undisputed testimony of the Plaintiff's expert witness was that the consideration for the purchases would have been reasonable even without including the discharge of the Stones' obligation under the promissory notes. Aplt. App. 1136-40.

B. Use of Funds Borrowed from the Springfield Entities

The Stones make two primary arguments relating to the payments that David Kinnard made to Robert L. Stone. First, they argue that the payments cannot serve as consideration because they were merely payments under a prior obligation (namely, the alleged arrearage in payments on the $17,000 monthly distribution). Second, they argue that the payments are null and void because they actually came from Springfield in violation of the requirement that a partner only borrow from the entity with the written consent of the other partners.

The first argument is plainly without merit. It is a factual question whether the Kinnards' periodic failure to pay the $17,000 monthly distribution created a "prior obligation" such that later payments would essentially constitute a satisfaction of the pre-

existing debt. The district court concluded that the monthly payments were not guaranteed payments, but rather were advances on the Stones' distributive share. Kinnard, 2008 WL 4000445, at *6. This conclusion was not clearly erroneous, given that it is amply supported by testimony from David Kinnard, the accountant for the entities involved, the Kinnards' expert witness, and the Stones' tax returns. The district court had the discretion to credit this testimony over that of the Stones, and we have no basis for finding clear error. See Penncro Assocs., 499 F.3d at 1161.

The second argument proffered by the Stones also fails. The Stones contend that David Kinnard took the funds from Springfield in violation of the Springfield operating agreement, and that, *ergo*, the payments were void and of no effect. However, this argument depends on the related issue of whether

the Stones had waived their right to enforce the pertinent provision in the Springfield operating agreement. The district court concluded that the Stones had waived their rights by previously borrowing from Springfield without the written consent of the Kinnard brothers. Kinnard, 2008 WL 4000445, at *7.

Under Oklahoma law, in order to waive a right, "there must be an actual intention to relinquish a known right, either expressly, or by such conduct as warrants an inference of such relinquishment." Atlas Life Ins. Co. v. Schrimsher, 66 P.2d 945, 948 (Okla. 1937); see Whitmire v. Zolbe, 403 P.2d 445, 448-49 (Okla. 1965). The district court correctly concluded that this standard had been satisfied, given that the Stones had taken a loan from Springfield without the other owners' written consent on prior occasions. Moreover, the

arrangement whereby the Stones consistently took advances of their distributive share of income from Springfield—thereby creating an account receivable or debt in favor of OIG and Springfield—also supports the district court's finding of waiver. Thus, the Stones intentionally bypassed the written consent provision by taking the loan in contravention of the provision. Accordingly, their waiver was knowing and demonstrated by explicit conduct, as is required by Oklahoma law. Atlas Life Ins. Co., 66 P.2d at 948. The Stones cannot now use the provision that they bypassed against their erst-while partners. The Stones' arguments before this court that they did not waive the provision in the operating agreement miss the key point raised by the district court.[6] The Stones waived their rights

[6]We do not need to reach the Stones' argument that the Kinnards breached their fiduciary duties, as it was not properly

under the operating agreement not because *David Kinnard* had taken a loan from Springfield without written consent (which is how the Stones frame the argument); rather, they waived their rights by taking a loan from Springfield *themselves* without written consent. Accordingly, the issue is not whether the Stones' failure to object to another party's breach constitutes waiver; instead, the issue is whether the Stones' own violation of the agreement operates as a waiver. As noted above, we conclude that it does. Furthermore, we recognize that the Stones argue to this court that they "took that loan from the Kinnard Brothers individually, not from Springfield," Aplt. Br. 39, but there is sufficient factual support for the district court's

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raised in the district court. The Stones attempted to amend their counterclaim to add an additional claim for breach of fiduciary duty, but the district court rejected their motion as untimely.

conclusion that they did take the loan from Springfield that we cannot say this factual finding was clear error. As noted above, the most significant evidence supporting the district court's conclusion is that Mr. Stone himself testified that he had taken a loan from Springfield without written consent, and had signed a promissory note payable to Springfield. Accordingly, we find no error.

Having concluded that the Stones waived their right to enforce the pertinent provision in the Springfield operating agreement, we must also conclude that the funds David Kinnard provided to the Stones constituted valid consideration. The district court's conclusion that the Stones "received reasonable consideration for their interests in the subject entities," Kinnard, 2008 WL 4000445, at *8, is not clearly erroneous given the underlying evidence which supports it.

III. Unclean Hands

The Stones also contend that the district court erred by granting an equitable remedy to a party who it found to have "unclean hands." The unclean hands doctrine means, in general, that equity will not aid a party whose conduct has been "unlawful, unconscionable, or inequitable." Houston Oilers, Inc. v. Neely, 361 F.2d 36, 42 (10th Cir. 1966). However, "the doctrine . . . should [not] be applied in every case where the conduct of a party may be considered un-conscionable or inequitable." Id. Here, we have no reason to conclude that the district court abused its discretion by not applying this doctrine. Id. ("The maxim admits of the free exercise of judicial discretion in the furtherance of justice."); see Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc., 562 F.3d 1047, 1058 (10th Cir. 2009) (reviewing application of unclean hands doctrine for abuse of

discretion). In particular, we note that this argument was apparently not raised before the district court. It is based primarily on the Stones' argument that the Kinnards breached their fiduciary duty—a claim not properly presented below. Further, the Stones overstate the district court's finding regarding unclean hands. While the district court found that both parties had unclean hands regarding the Springfield operating agreement's prohibition on loans without written consent, Kinnard, 2008 WL 4000445, at *7, it did not so find regarding the broader fiduciary claims now advanced by the Stones. Accordingly, we find that the district court did not abuse its discretion.

IV. Right to an Accounting

Finally, the Stones argue that the district court erred by denying them the right to a full accounting. According to the Stones, a fair trial was

impossible with an incomplete accounting, and this inadequacy demonstrates that the district court erred by failing to grant them their requested relief. However, this misconstrues the issue. The district court actually held that the Stones had as a factual matter received a "full accounting of the entities, utilizing accepted principles of forensic accounting," not that they were not entitled to such an accounting. Kinnard, 2008 WL 4000445, at *10. We cannot say that this factual finding was clearly erroneous. An expert accountant testified that he was able to perform an accounting for all the entities involved given the tax returns and other information available to him, and that expert provided a full report with documentation. This evidence gave the district court a sufficient basis to conclude that an adequate accounting had been provided. Kinnard,

2008 WL 4000445, at *6 n.17. We find no clear error.

The district court's judgment is AFFIRMED. The motion to supplement the record is DENIED.

Entered for the Court

[s] Paul J. Kelly, Jr.
Paul J. Kelly, Jr.
Circuit Judge

Case 5:07-cv-00250-R Document 114 Filed 08/25/208

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID H. KINNARD et al.,	)	
	)	
Plaintiffs,	)	
v.	)	**CIV-07-250-R**
	)	
ROBERT L. STONE;	)	
CYNTHIA A. STONE; and	)	
ROBERT L. STONE, M.D.,	)	
	)	
Defendants.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court conducted a non-jury trial of this matter from June 17, 2008 until June 20, 2008. Following the conclusion of the trial, the parties submitted pro-posed findings of fact and conclusions of law. Having considered the evidence presented, the Court makes the following findings and conclusions.

The Court notes at the outset the general lack of credibility of all the parties to this action. The facts as found by the Court represent the Court's interpretation of the likely facts as separated from the obvious fiction presented by many of the witnesses. Additionally, the record keeping of both Plaintiffs and Defendants was severely deficient and renders it a near impossibility for even the experts to discern the actual history of transactions between the parties. The fault, however, lies with all parties. Any party who concludes that the Court clearly favored the opposing side would be incorrect. This is a tale of apparently intelligent people who have little business sense or common sense.

The parties' dealings began many years ago, when Plaintiff Roger Kinnard and Defendant Robert L. Stone became friends while attending the University of Chicago. Robert L. Stone and Cynthia Stone

are now husband and wife; however, Cynthia Stone was formerly married to Roger Kinnard. During the 1980's, Roger Kinnard, his brother, David Kinnard, and Robert L. Stone, initiated a number of business ventures for purposes of buying and running apartment buildings in Oklahoma. The ventures were known collectively, and managed loosely, as the Oklahoma Investment Group. The Oklahoma Investment Group functioned as a common management structure, or aggregator, for a number of entities, including: Cinnamon Creek, LLC, incorporated in 1999;[3] Peppertree Partners, Ltd.,[4] formed in 1992; Windrock Associates, an Oklahoma general

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[3] Robert L. Stone, David Kinnard and Roger Kinnard each owned one-third of Cinnamon Creek, LLC.

[4] David Kinnard, Roger Kinnard, Robert L. Stone, and a fourth person each owned 24.75% of the partnership. The remaining one percent was owned by the general partner, Pepper-tree Partners, Inc, a corporation with four shareholders, the limited partners.

partnership formed in 1989,[5] Summer Pointe Partners, Ltd., founded in 1991;[6] and Springfield Village Apartments, Ltd., an Oklahoma limited liability company, incorporated in 1990.[7] These entities did not maintain separate bank accounts. Rather, a single account in the name of Oklahoma Investment Group, which had virtually no assets, was used for both receiving monies and making payments. Within this single account, separate balance sheets were maintained for each entity. Each entity filed its own

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[5]David Kinnard, Roger Kinnard, and Robert L. Stone were equal partners, each owning one-third of the Windrock Associates.

[6]Summer Pointe Partners' general partner was Summer Pointe Partners, Inc., owned by Cynthia Stone, Roger Kinnard, Margaret McLaughlin and Samuel Brown. The limited partners were David Kinnard, Roger Kinnard, Sam Brown, Margaret McLaughlin, and Cynthia Stone.

[7]David Kinnard, Roger Kinnard, and Robert L. Stone, were equal members of Springfield Holding Company, LLC, which owns ninety-nine percent of Springfield Village Apartments, Ltd.. The remaining one percent is owned by Springfield Apartments, Incorporated, which had three shareholders, Roger Kinnard, David Kinnard and Robert L. Stone.

tax returns. Mark Reinitz served as manager of Oklahoma Investment Group, which was run by David Kinnard. During the relevant time period Roger Kinnard was living in Boston and Robert L. Stone and Cynthia Stone were living in Chicago. Mark Reinitz and David Kinnard were living in Oklahoma, although David Kinnard spent considerable time out of the country.

Problems began with regard to the entities when Robert L. Stone and Cynthia Stone relocated to Chicago in 1996. David Kinnard agreed that for a period of five years, Robert L. Stone would receive monthly "allowance payments."[8] These payments

[8] Actually the payments were to be made by Oklahoma Investment Group, which had no assets, but was the only entity with a bank account. Apparently the draws were debited against Stone's distributive share of the various entities, and any excess created an account receivable in favor of Springfield Village. Curiously there was no testimony regarding the accounting methodology employed with regard to the payments. Additionally, it is unclear what the Stone's believed was their obligation vis-a-vis the Internal Revenue Service with regard to the payments, although it was made clear to Mr.

were designed to assist the relocation of Robert L. Stone and his family from Oklahoma to Chicago. The payments were not treated as "guaranteed payments" for tax purposes, but rather as advances on distributive share, and thus did not appear on the various Schedule K-1s produced by the entities. From 1996 through 1998, and again from March 2000 through early 2005, monthly payments were made by Oklahoma Investment Group on behalf of the partnership entities to the Stones. No payments were made during 1999, and apparently Robert L. Stone did not object to the absence of payments. The rationale for the failure to make payments in 1999 is of course hotly contested. David Kinnard testified that no payments were made because Robert L. Stone was not requesting money, apparently having

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Stone by the Oklahoma Investment Group accountant that the payments were not being deducted as expenses by the entities.

made a considerable amount of money in a "side deal," that be-comes a part of the tangled web presented in this action. According to Robert L. Stone, the failure to make payments was an effort to extract a settlement with regard to this "side deal," a situation that the parties referred to as "the Beatrice Dispute."

Upon relocating to Chicago in 1996, Robert L. Stone sought to acquire a refrigerated warehouse located downtown from Beatrice Associates, a Florida general partnership. Springfield Village loaned Robert L. Stone and Cynthia Stone $305,000.00, which they in turn used to purchase the warehouse. Robert L. Stone thereafter instituted litigation against the tenant, Americold Corporation, for dam-age to the leasehold. The underlying litigation was settled in 1998 for 3.6 million dollars. Robert L. Stone repaid the Springfield loan.

including interest. For reasons still unclear, Robert L. Stone had agreed to "a kicker" that is, that once the Beatrice litigation was settled, he would pay Roger Kinnard and David Kinnard ten percent of the net settlement proceeds. A dispute arose regarding the definition of net settlement proceeds, specifically how the litigation costs were to be measured. Defendant contends the monthly allowance funds were withheld in 1999 and early 2000 an effort to extort a settlement of this Beatrice dispute.[9]

From March 2000 until 2003, the monthly payments continued via Oklahoma Investment Group. In early 2003, Robert L. Stone took control of Redux Office Furniture Company in Chicago, which refurbished office furniture. Robert L. Stone sought funding for Redux from Roger Kinnard. Roger

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[9]No resolution of this issue was achieved prior to the assignments that form the basis of the instant dispute.

Kinnard asked David Kinnard about the possibility of investing. David Kinnard refused to invest in the company, but offered to accept an assignment of Robert L. Stone's interest in Cinnamon Creek, LLC in exchange for giving Robert L. Stone $100,000. The assignment as executed by Robert L. Stone stated that he "hereby sells, assigns, transfers and conveys to Assignee all of his membership and other ownership interest of any kind in Cinnamon Creek L.L.C., an Oklahoma limited liability company (the "Company"), and all rights appurtenant thereto, including but not limited to the right to receive distributions, profits or income of any kind." Although not commemorated in writing, the loan included a buy-back provision, permitting Robert L. Stone to repurchase his interest in Cinnamon Creek, LLC within six months, with an interest rate of 36%. The funds transferred by David Kinnard

were borrowed from Springfield Village, and the amount was reflected by an increase in David Kinnard's account receivable account.[10] Robert L. Stone tendered $130,000.00 to David Kinnard, and Robert L. Stone's ownership interest in Cinnamon Creek, LLC was restored on October 1, 2003. No further problems arose during 2003 between the partners.

In late February 2004, Robert L. Stone approached David Kinnard, seeking to borrow additional money. On March 3, 2004, Robert L. Stone executed an Assignment of Membership Interest identical to that executed in 2003, assigning his membership interest in Cinnamon Creek to David Kinnard. Although not stated in the assignment, the

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[10]The parties utilized the term "account receivable" to indicate both money owed to a partner or member or money owed to an entity by a partner or member. Although traditionally money owed would be considered an account payable, as to the debtor, the entities' accounting reflected any debt owed by a partner or member as a negative account receivable, not an account payable of the partner or member.

amount agreed upon was $45,000.00. The $45,000 was wired to the bank account of the Children's Fund, at the direction of Robert L. Stone, on March 5, 2004. This value was determined by calculating the capitalized value of Robert L. Stone's interest in Cinnamon Creek, LLC.[11] Although not stated in the assignment, Robert L. Stone had the right to restore his interest by tendering payment to David Kinnard of the $45, 000, plus interest, the amount of which escalated depending on when the principal was repaid. The buy-back option terminated six months after the assignment, and it was noted in a March 2, 2004 e-mail to Robert L. Stone that "[i]f more than

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[11]The capitalized value of Robert L. Stone's interest was calculated by dividing Cinnamon Creek, LLC's net operating income by a capitalization rate of 10.5%. The cost of debt servicing, i.e. the mortgage, was deducted from this value to determine the net capitalized value of Cinnamon Creek, LLC. The value of Robert L. Stone's interest in Cinnamon Creek, LLC was his pro rata share of the net capitalized value of the entire property.

six months have passed without complete payment, David shall retain permanently the Cinnamon share herein discussed." To finance the purchase David Kinnard utilized funds borrowed from Springfield Village, which increased his accounts receivable.[12] Robert L. Stone did not repay the $45,000.00 to David Kinnard. Robert L. Stone apparently conceded in early 2005 that he no longer owned an interest in Cinnamon Creek, LLC, as reflected in the financial statement prepared by Sergey Galant, the Oklahoma Investment Group accountant. Robert L. Stone made suggestions regarding entries on the

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[12]This same structure was utilized for all of the assignments at issue herein. According to Sergey Galant, the borrowing is reported as debt of partners to the company. As a result David Kinnard's accounts receivable increased. Plaintiffs expert testified that in valuing Robert L. Stone's interest in the entities that he included David Kinnard's debt as an asset of the entities, to which Robert L. Stone was entitled to his proportional share. David Payne also testified that the capital accounts of the partners were in balance.

statement, but did not question the absence of any ownership interest in Cinnamon Creek, LLC.

In June 2004, Robert L. Stone requested additional funds. Via e-mail from Mark Reinitz, it was noted that in exchange for the assignment of his interest in Peppertree Partners, Ltd. and Peppertree Partners, Inc., David Kinnard would pay Robert L. Stone $10,200.00. Combined with other payments previously sent to Robert L. Stone and mortgage payments not received from him for certain Oklahoma Investment Group properties, the total amount of compensation was $43,000.00.[13] On June 10, 2004, Robert L. Stone executed an assignment of his interest in the Peppertree entities. Again, although not contained in the assignment, the

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[13] In a June 9, 2004 e-mail, from Mark Reinitz to Robert L. Stone and others, Mark Reinitz noted "[w]e will wire $10.2K to Rob, which with other payments sent to Rob and not received from him comes to a total of $43K paid for Rob's whole Pepper-0tree ownership share."

transaction permitted Robert L. Stone to repurchase his shares within six months, with incremental increases in the amount due.[14] Robert L. Stone did not repay any money to David Kinnard. As with the Cinnamon Creek, LLC purchase, the money used by David Kinnard to purchase Robert L. Stone's shares was borrowed from Springfield Village and resulted in an increase in David Kinnard's accounts receivable.

In August 2004, Robert L. Stone requested additional money for purposes of funding his Chicago venture. On August 13, 2004, Robert L. Stone executed an assignment of his interest in Windrock Associates to David Kinnard. In exchange for his assignment, Robert L. Stone received $145,000.00,

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[14]The June 9, 2004, e-mail indicated that "[i]f more than six months have passed without complete payment by Rob, David Kinnard shall retain permanently the Peppertree share here-in discussed."

the capitalized value of his ownership interest, spread over a period of months. Again, although not part of the documentation, Robert L. Stone had the opportunity to repay the amount within six months and to reclaim his ownership interest. Robert L. Stone did not exercise his rights. In December 2004, Robert L. Stone again requested money from Roger Kinnard. Roger Kinnard contacted his brother, via Mark Reinitz, and David Kinnard agreed to "loan" Robert L. Stone $45,000.00.[15] "Rob says that for this $5K and some previous wire advances, he will assign his share of Summer Pointe to Dave, with the usual 6 month buy-back option." Plaintiff's Ex. 71. Oklahoma Investment Group transferred $5,000.00 to Robert L. Stone on January 25, 2004. Combined with transfers on December 2, 10, and 30, 2004, the

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[15]In actuality the transaction called for David Kinnard to loan Robert L. Stone $5,000, and for David Kinnard to cover $40,000 of Robert L. Stone's prior advances.

total consideration was $45,000.00. The assignment was made by Robert L. Stone effective March 1, 2005. Robert L. Stone did not repay the amount to David Kinnard. Additionally, on March 1, 2005, Robert L. Stone executed an assignment of his membership and stock ownership in the Springfield Entities, Springfield Holding Company and Springfield Apartments, Inc., to David Kinnard. The same assignment form was utilized and again there was an unwritten six month buy-back provision. In exchange for the assignment, Robert L. Stone received $81,000 in cash, and David Kinnard agreed to cover $360,689.37 of accounts receivable owed by Robert L. Stone to Springfield, and the forgiveness of two promissory notes. One promissory note, related to the Beatrice dispute, was allegedly executed in an attempt to finally resolve the issue of the ten percent due and owing to David and Roger Kinnard. This

note required that it be fully paid by September 15, 2005, six months after its execution, in order for Robert L. Stone to regain his shares in the Springfield entities. The second note was designed to address a debt by Robert L. Stone to Bernice Kinnard, Roger and David's mother.[16] According to David Kinnard, in exchange for Robert L. Stone's interest in the Springfield entities, no one would attempt to collect this debt. Additionally, according to Mark Reinitz, David Kinnard was assuming the debt, making him liable for payment to his mother.

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[16]The earliest evidence of this transaction is an e-mail from December 2004, whereby Robert L. Stone indicated that he would agree that whatever amount he owed Mrs. Kinnard, together with a loan for $20,000 that he was requesting, would be secured by his interest in Springfield Village. Defendants' Ex. 153. Thereafter, on December 30, 2004, Robert L. Stone submitted a proposed agreement to utilize his interest in Springfield Village as security for subsequent money borrowed from Oklahoma Investment Group, money owed to Bernice Kinnard and any award from the arbitration of the Beatrice Dispute. Defendants' Ex. 154. In January it was noted in an e-mail to Robert L. Stone from Mark Reinitz that "[o]ther previous wire advances plus the Beatrice money owed (about $250K) and approximately 500K still owed to Mrs. Kinnard will all go against Rob's share of Springfield, as he has indicated in earlier emails." Plaintiff's Ex. 71.

The cash portion of the transaction was wired to the account of The Children's Fund, at Robert L. Stone's request. Robert L. Stone did not repay any of the amount to David Kinnard.

In April 2005, Cynthia Stone owned a 5.5% interest in the Summer Pointe entities. Robert L. Stone spoke with Mark Reinitz about the possibility of Cynthia Stone assigning her interests to David Kin-nard. On April 7, 2005, Ted Teske advised Cynthia Stone and Robert L. Stone via telephone that the assignment she was being asked to execute was not a loan or security for a loan; it was a sale and an assignment of Cynthia Stone's entire interest in the Summer Pointe Entities. The call from Ted Teske was in response to a request by Robert L. Stone that he explain to Cynthia that the assign-ment was in fact merely security for a loan. Robert L. Stone seemed surprised by Mr. Teske's

interpretation of the assignment. Mr. Teske further explained that Robert L. Stone has previously assigned his entire interest in the entities, and that the buyback period had expired for certain of those properties. Thereafter, Ted Teske sent an email to Cynthia Stone with an attached assignment. Per the e-mail, the purchase price was to be $42,000.00.

On April 8, 2005, Cynthia Stone executed and delivered an Assignment of Membership Interest of all of her membership and stock ownership in Summer Pointe Partners, an Oklahoma limited partnership, and Summer Pointe Partners, Inc. to David Kinnard. On April 8, 2005, Oklahoma Investment Group wired $7,000.00 to the account of Robert Stone at Lakeshore Bank. On April 11, 2005, the balance of $35,000.00 was wire transferred to the same account. The wire transfer notation indicated it was the final payment for the assignment of interest

in Summer Pointe from Cynthia Stone to David Kinnard. Neither Cynthia Stone nor Robert L. Stone ever paid any money to David Kinnard to redeem their ownership interest.

In May 2005, Roger Kinnard informed the Defendants that no additional money would be forthcoming from the Oklahoma Investment Group account, because Defendants no longer maintained an ownership interest.

As noted above, at some point in time Robert L. Stone borrowed money from Bernice Kinnard. This debt was apparently never repaid, the amount owed is disputed, and Mark Reinitz testified that as part of the compensation paid to Robert L. Stone for his interest in Springfield Village, David Kinnard assumed the debt. As with many of the transactions involved in this action, the original debt apparently was not commemorated in writing. Although Robert

L. Stone disputes the existence of the debt, there is a promissory note signed by Robert L. Stone indicating a debt to Bernice Kinnard totaling $500,000.00. Defendants' Ex. 400. In February 2004, Robert L. Stone sent an e-mail to Roger Kinnard acknowledging a debt, but noting the disputed amount. Defendants' Ex. 123. On December 10, 2004, Robert L. Stone acknowledged the debt as well. Defendants' Ex. 153. On January 25, 2005, Mark Reinitz estimated to Robert L. Stone that he owed approximately $500,000 to Mrs. Kinnard. Defendants' Ex. 165. Robert L. Stone acknowledged, and did not dispute this estimate, in an e-mail to David Kinnard, Roger Kinnard and Mark Reinitz. Plaintiff's Ex. 70. This debt was transferred to David Kinnard by virtue of the March 2005 transaction regarding Springfield Village.

As a result of the parties' inability to agree on whether the Stones own any interest in any of the entities, Plaintiffs filed this action. David Kinnard seeks a declaratory judgment that the assignments set forth above were valid and legally binding such that none of the defendants have any right, title or interest in any of the entities. Plaintiff David Kinnard requests an order restraining Defendants from ever claiming, for any purpose, an ownership interest or financial interest in any of the entities. Defendants filed counter-claims seeking a full accounting for each of the entities and a declaratory judgment that they have ownership rights in the entities.

Because the assignments are the foundation of the action, the Court will first consider the legality and effect of the Stone's various assignments. Robert L. Stone contends that certain of the

assignments were prohibited by the terms of the partnership agreements or the operating agreements of the particular entity.

According to the Cinnamon Creek, LLC operating agreement, any assignment of a member's interest required the consent of each member, via written and dated instrument. Additionally, it required that each member file the necessary documents for a transferee to become a substitute member and that the company receive an opinion of counsel that the transfer would not materially adversely affect the company's classification for tax purposes. The Court notes that in 2003, without considering any of these issues, Robert L. Stone assigned his interest in Cinnamon Creek, LLC to David Kinnard. Additionally, when the money was repaid in late 2003, Robert L. Stone's interest was restored, an assignment in and of itself. When

Robert L. Stone assigned his interest a second time in 2004, again without concern for the provisions of the Cinnamon Creek, LLC operating agreement, the Court concludes that he waived the requirements. Additionally, Robert L. Stone clearly agreed to the assignment of his interest by virtue of his signature on the assignment. Additionally, the e-mail messages between Mark Reinitz, David Kinnard and Roger Kinnard are sufficient to fulfill the written consent requirement. Obviously David Kinnard consented, and Roger Kinnard's consent is found within these e-mails. Furthermore, because David Kinnard was already a member, there was no issue regarding substitution of a member, and Mark Lovelace of Phillips McFall had previously consulted with Plaintiffs on the 2003 sale of Cinnamon Creek, LLC. Accordingly, the Court concludes that provision in the Cinnamon Creek, LLC operating

agreement were waived by Robert L. Stone, and alternatively, that the conditions were fulfilled.[17]

The partnership agreement for Peppertree Partner, Ltd., permits the transfer of a partner's interest with the approval of the general partner. The limited partner seeking to transfer his interest must request permission in writing and pay a non-refund-able fee of four hundred dollars, and counsel must be consulted regarding the effect of such transfer on the partnership.[18] Clearly the condition

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[17]The Cinnamon Creek, LLC Operating Agreement provides, in part: No failure by any party to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement or condition. Defendant Robert L. Stone cannot rely on this provision when his actions were the actions taken in violation of the terms of the Operating Agreement related to transfer of interest.

[18]The partnership agreement provides: The limited part-ner seeking to transfer his interest must first apply in writing to both the general partners at their addresses on the books of the Partnership and pay a non-refundable fee of four hundred dollars ($400 00) to the resident agent of this Partnership in this state at the address listed above, to cover

of consent was met, because David Kinnard, on behalf of the corporate general partner, gave his consent. Additionally, Mark Lovelace was consulted regarding the proposed transfer, and apparently concluded that the transfer to David Kinnard would not impact Peppertree's status. Accordingly, Defendants' contention that Plaintiffs failed to comply with these requirements is without merit.

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the costs and expenses of preparing, executing, and filing a certificate of Amendment with the office of the Secretary of state of Oklahoma; (b) Upon receiving such notice, the general partners shall present copies of said notice to counsel for the Partnership; (c) If in the opinion of such counsel, the proposed transfer of such partnership interest may be effected without registration thereof under the Act, as then in force, or any similar statute then in force, and applicable state securities law, the general partners shall promptly there after so notify the holder of such partnership interest. Then the general partners shall decide in writing whether, in their sole discretion, they will permit said transfer. A unanimous vote is required to approve the transfer and to admit the transferee to the Partnership as a new limited partner. Approval must also be in accordance with the terms of the notice delivered by the transferor to the general partners, in accordance with this certificate, and upon such further terms and conditions as shall be required by counsel for the Partnership in order to assure compliance with the Act and applicable securities laws." Defendants' Ex. 302.

With regard to Summer Pointe Partners, a limited partnership, Defendants allege that its bylaws provide that a transfer of shares to any present share-holder is valid only upon unanimous approval of all other living shareholders. The bylaws, however, were not introduced into evidence at trial, and the certificate of limited partnership contains no such requirement. Furthermore, Mark Reinitz testified that with regard to the transfer of Robert L. Stone's interest in Summer Pointe, that he questioned the other partners, Roger Kinnard, David Kinnard, Samuel Brown, and Margaret McLaughlin, and none had any objection to the transfer. Accordingly, this provision if it exists did not preclude the transfer of Defendants' interests in Summer Pointe.

Defendants alternatively seek to avoid the effect of the assignments by arguing, with regard to

each particular assignment, that they received no consideration for the transfer of their interests. Additionally, Defendants argue that because the fund transfers came from the Oklahoma Investment Group account, that they did not receive consideration from David Kinnard, the purported purchaser of their interests. Additionally, Defendants contend that as a result of the guaranteed monthly allowance, and Oklahoma Investment Group's failure to consistently send the requisite payments, that Oklahoma Investment was indebted to the Stones, and that any alleged advances, should have been set off by the debt owed to them. The Court disagrees.

Robert L. Stone contends that the promise of a monthly allowance created an account payable, in his favor, for any month the promised amount was not received. Plaintiff's expert, one of the few

credible witnesses in the case, testified that he had completed a full accounting of the entities, utilizing accepted methods of forensic accounting.[19] He testified that payments made to partners or to members of a limited liability corporation can take one of three forms: (1) guaranteed payments, generally a salary to a partner for work expended, which are deducted by the entity as an expense; (2) distributions of operating income, that is a partner's pro rata share of net operating income less the debt service; and (3) loans. Loans are essentially any moneys paid to a partner or member in excess of his

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[19]Defendants contend that no "full accounting" was completed, because Mr. Payne did not have access to the general ledgers from the inception of the entities. Mr. Payne testified that it is not unusual that business entities do not retain all of their general ledgers. He testified that by virtue of the tax re-turns for the entities that he was able to determine historically what distributions had been made to the members and the partners. There is no evidence that the entities tax returns did not accurately state the payments made to the partners as distributions.

or her distributive share. At no time were the monthly payments to Robert L. Stone treated as guaranteed payments, deducted as an expense by the entities and reported to the Internal Revenue Service as guaranteed payments made to him. The Court concludes that the "monthly allowance" had the potential to create debt from Robert L. Stone to the Oklahoma Investment Group member entities, to the extent the amounts exceeded his distributive share. However, the failure to make one or more payments did not create debt in favor of Robert L. Stone against Oklahoma Investment Group or any entity or individual. Any money paid monthly, or otherwise, to Robert L. Stone was either a distribution or a loan. Distributions in excess of his distributive share created a liability in favor of the entities.[20]

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[20]The Court is unable to accept the testimony of Defen-

Mr. Payne testified that the capital accounts of each partner were essentially in balance, that is, that the distributions of capital to David Kinnard, Roger Kinnard, and Robert L. Stone, were proportionate to their ownership interests. The partners loan accounts, however, were not in balance. Roger Kinnard had the largest accounts

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dants' expert because it is based on a faulty premise: that the monthly allowance was a guaranteed payment and that the failure by Oklahoma Investment Group to make a monthly payment resulted in a liability on its part and an asset on the part of Robert L. Stone. Such was not the case. As indicated in an e-mail dated March 22, 2002, from Jeremy White, then-Oklahoma Investment Group accountant, to Robert L. Stone, the payments to Robert L. Stone were distributions "instead of compensation" because "the payments to you are your share of net income from the partnerships you own. It is not compensation that we are paying to you since the partnerships do not get to count it as an expense." Defendants' Ex. 16. The accountant refused to consider the payments as guaranteed payments and the K-1s issued by the entities rarely reported distributions to their partners or Members. As a result, Robert L. Stone should have realized that the hundreds of thousands of dollars that he was receiving annually would have to be balanced against his distributive share. Indeed, in early 2005, when preparing his financial statement in conjunction with Sergey Gallant, Robert L. Stone did not question the fact that his account receivable, that is his debt to Oklahoma Investment Group, was nearly one million dollars. Defendants' Ex. 174, 177.

receivable, followed by Robert L. Stone and then David Kinnard. As noted above, David Kinnard's accounts receivable grew substantially in 2004 and 2005, as he leveraged his interest in order to acquire Robert L. Stone's share. Defendants contend that this was improper for a multitude of reasons, including the fact that the money was all on the books of Springfield Village, and its operating agreement prohibited loans to the members.[21]

The Springfield Village Operating Agreement provides in Article 4, Section 4.3, that "[t]he Company shall not make any loans to any member or any affiliate of any member without the written consent of all members holding as least three fourths (3/4) of

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[21]The accounting methodology for the entities involved transferring all accounts receivable to the books of Springfield Village. Plaintiff's expert testified that Springfield Village is by far the most profitable of the entities, and that it was in the best financial position to advance moneys, and thus the transfer of the debt was not impermissible or unusual.

the outstanding Units of the Company." Defendants' Ex.329. Defendants contend that Plaintiffs did not have the required written consent. The Court concludes that by his consent Robert L. Stone waived this requirement.

In *Atlas Life Ins. Co. v. Schrimsher*, 179 Okl. 643, 66 P.2d 945 (948) (1937), the Oklahoma Supreme Court said:

> Although the definitions of waiver are myriad and conflicting, it may be said with certainty that in order to constitute a waiver, there must be an actual intention to relinquish a known right, either expressly, or by such conduct as warrants an inference of such relinquishment ... The most rudimentary essential of a waiver is that the waiving party shall in some manner publish his intention to relinquish his rights, either by words or conduct. As stated in 67Corpus Juris, 294, 'waiver' 'is a doctrine, resting upon an equitable principle, which courts of law will recognize, that a person with full knowledge of the facts shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another.'

In 1997, Robert L. Stone and Cynthia Stone borrowed $305,000.00 from Springfield Village Apartments, Ltd, an Oklahoma limited liability company, to procure the Beatrice Warehouse. Plaintiff's Ex. 361. There is no evidence of written consent by David Kinnard and Roger Kinnard to the loan for that transaction. Additionally, On June 3, 2004, and June 14, 2004, Defendant Robert L. Stone requested advances on his partnership distributions, which would likely include money from the Springfield Village apartment. The Court finds that Robert L. Stone, David Kinnard and Roger Kinnard acted with equally unclean hands, thereby waiving the written permission requirement with regard to loans from Springfield Village. As such, Robert L. Stone cannot complain at this juncture that the borrowing of money from Springfield Village Apartments, Ltd.

by any of the partners was improper under the terms of the operating agreement.

Defendants further contend that they received no consideration and additionally that even if they received consideration, it did not come from David Kinnard, and thus their interests were not transferred to him. The Court need not reiterate the litany of payments made to Robert L. Stone during 2004 and 2005. With regard to each of the entities, there is evidence of adequate consideration having been exchanged. David Payne testified that Robert L. Stone and Cynthia Stone received reasonable consideration for their interests in the subject entities. The funds sent to Robert L. Stone from the Oklahoma Investment Group account for the transfer of his interest in each entity created a debt to Springfield Village payable by David Kinnard. The Court accepts Mr. Payne's testimony.

> If Mr. Kinnard paid Mr. Stone direct, Mr. Kinnard, being a controlling member, would have the ability after he paid Mr. Stone direct to advance money back to himself or withdraw money from the partnership and be in the same economic position that he is as if he could pay direct and then withdraw or he could just withdraw the funds out of the partnership through Oklahoma Investment Group and pay it and then burden his interest and both Mr. Stone and Mr. Kinnard would be in the same economic positions regardless of the form of the transaction. Tr.Vol. II, p. 474.

Mr. Payne further testified that Robert L. Stone received cash from the entities in excess of his distributive share and, with regard to the sale of his interest in Springfield Village, that David Kinnard assumed responsibility for Robert L. Stone's accounts receivable. Additionally, Robert L. Stone received consideration by David Kinnard's assumption of the obligation on the Beatrice Kinnard note. Additionally, Robert L. Stone does not dispute the existence of a "kicker" on the Beatrice deal, nor does

he dispute that he did not fulfill his obligation, and that his obligation to David Kinnard and Roger Kinnard has been extinguished by virtue of the Springfield Village assignment. The Court concludes that considered both singly and collectively, Robert L. Stone and Cynthia Stone received reasonable consideration for their interests, and thus are not entitled to rescission or other remedy on this basis.

Finally, the issue remains whether the assignments were sales or loans. Although the Plaintiffs at various times used both terms to describe the arrangements, and although Robert L. Stone testified that he believes he merely utilized his interests as collateral for loans with unlimited time for repayment, the Court concludes that the assignments were sales with the right to redeem, which right was not exercised within the time prescribed nor in fact, ever. The 2003 Cinnamon Creek, LLC assignment is

instructive in this case, and should have been a harbinger to Robert L. Stone of how subsequent transactions would be treated.

Robert L. Stone knew as early as March of 2003, that David Kinnard and Roger Kinnard were hesitant to loan him money. Defendants' Ex. 4. Mark Lovelace, counsel for Oklahoma Investment Group, sent an e-mail on March 26, 2003, to Mark Reinitz outlining the possibility of a sale versus a loan. That e-mail was forwarded by Mark Reinitz to Robert L. Stone on March 27, 2003, at 10:27 a.m. At 2:10 p.m. on that same day, Robert L. Stone, in apparent recognition that his desire for a loan would not come to fruition, sent a form for the unconditional transfer of partnership interest to Mark Reinitz. That same date, an e-mail from Mark Lovelace to all of the major players indicated that Robert L. Stone should sign and have the agreement notarized, so that

"funding of the agreed $100,000 sale price can occur tomorrow." Defendants' Ex. 48. Mark Lovelace noted, "I understand that we are also preparing an Option Agreement for Robert to be able to repurchase his membership interest." Defendants' Ex. 48.

Later, Robert L. Stone asked Mark Reinitz why it was important to describe the transaction as a "sale-redemption" and not as a loan. Defendants' Ex. 84. Thus, Robert L. Stone was aware that the Plain-tiffs believed he had sold his interest, not merely utilized his interest as security. David Kinnard further informed Robert L. Stone that "[t]here is no loan. There is only an opportunity to buy back shares. Please read these docs carefully." Defendants' Ex. 86. Despite this clear and unequivocal statement, Robert L. Stone later inquired of Jeremy White, "[w]hat is the amount necessary to pay off my non-loan from Oklahoma Investment

Group, and when is it due?" Defendants' Ex. 87. Robert L. Stone later referenced his "loan-like arrangement." Defendants' Ex. 89. Despite this history and Plaintiff's obvious intentions, Robert L. Stone subsequently utilized the same unconditional transfer on Cinnamon Creek, LLC, Windrock Associates, Peppertree, Summer Pointe, and Springfield Village. Robert L. Stone did not dispute the absence of Cinnamon Creek, LLC and Peppertree Partners as assets in his personal financial statement prepared by Sergey Galant in early 2005.[22] With regard to the each of entities Robert L.

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[22]The Court finds it curious that Windrock Associates remained on the list of assets owned by Robert L. Stone in December 2004, despite its earlier transfer. However, it appears that the lender on the property, for whom the financial statement was being prepared, had not yet okayed the transaction. Thus it appears that Robert L. Stone's interest, although previously transferred, was not excluded from his list of assets perhaps in an effort to avoid violating terms of the mortgage established by the lender. Defendants' Ex. 172.

Stone was unable or failed to exercise his option to re-purchase his shares. Additionally, Cynthia Stone was fully aware that the assignment was a sale and not security for a loan. Despite this knowledge, she executed the assignment and accepted a transfer of funds. Accordingly, the Court concludes that upon the expiration of the six-month option to repurchase, David Kinnard became the owner of the Defendant Robert L. Stone's and Cynthia Stone's interest in the subject entities. Defendants are not entitled to claim any interest in the properties.

Dr. Stone's Loan

Additionally, there is an issue between Springfield Holding Company and Dr. Robert L. Stone, Sr. The parties are unable to agree on the amount of the loan or whether it was repaid. As a result, Plaintiff Springfield Holding Company seeks a declaratory judgment against Dr. Stone that it

owes nothing on a loan he made to the company in the early 1990's, having repaid in full all principal and accrued interest and an injunction barring Dr. Stone from claiming any amount due from Springfield, David Kinnard or Roger L. Kinnard. Dr. Robert L. Stone seeks to recover on a theory of breach of contract, asserting that David Kinnard and Roger Kinnard are indebted to him on the $450,000.00, loan of which only $160,000.00 has been repaid. In 1992, the notes payable ledger of Springfield Village Apartments, the predecessor in interest of Springfield Holding Company, Ltd., indicated a debt to Dr. Stone totaling $164,269. 80. In June 1993, Dr. Stone received a $10,000.00 payment toward the principal. From 2000-2004, Robert L. Stone's distribution account was credited with $771.35 per month in interest. On September 19, 2005, Robert L. Stone was informed that the outstanding debt to

Dr. Stone would be repaid before December 2005. In fact, $163,526.20 was paid to Dr. Stone's bank account during that time. Despite Defendants' testimony, there is no other evidence of a $450,000.00 debt from any Springfield entity to Dr. Stone. The memorandum of agreement presented as Defendants' Exhibit 1 does not support the proposition that a $450,000.00 promissory note was ever made. Accordingly, no money is due and owing to Dr. Stone by any Plaintiff in this action or by any of the Oklahoma Investment Group entities by virtue of this agreement.[23] Accordingly, Dr. Stone is not entitled to judgment against the Plaintiffs in this action.

---

[23]The Court finds that Mr. Reda had the authority of the trustee from the bankruptcy court in the Northern District of Illinois to represent Dr. Stone in this action.

CONCLUSION

In accordance with the above findings, the Court concludes as follows:

(1) As of March 5, 2004, Robert L. Stone owned no interest in Cinnamon Creek;

(2) As of June 10, 2004, Robert L. Stone owned no interest in Peppertree Partners;

(3) As of November 16, 2004, Robert L. Stone owned no interest in Windrock Associates;

(4) As of April 7, 2005, Robert L. Stone owned no interest in Springfield Village Apartments;

(5) As of March 1, 2005 Robert L. Stone owned no interest in Summer Pointe;

(6) As of April 11, 2005, Cynthia Stone owned no interest in Summer Pointe;

(7) The Stones received reasonable consideration for their interests in the above-listed entities, as agreed upon by the parties;

(8) David Kinnard, the purchaser, provided reasonable consideration for the Stones' various interests;

(9) All of the parties ignored the requirement of Springfield Village that written consent of a majority of the members be obtained before loans could be made, thus this requirement was waived;

(10) Robert L. Stone, during his time as an owner of the various Oklahoma Investment Group entities, received money in excess of his distributive share of the income of the entities;

(11) Although David Kinnard promised to pay Robert L. Stone a minimum amount monthly, the failure to pay amounts in 1999 and 2000 did not create a debt from Oklahoma Investment Group or any of its entities; these amounts, to the extent they exceeded the Stone's distributive shares, were advances, creating accounts receivable in favor of the

entities, as consolidated in favor of Springfield Village;

(12) David Payne performed a full accounting of the entities, utilizing accepted principles of forensic accounting, his results are not undermined by the absence of general ledgers for the period prior to 2000, and thus Defendants are not entitled to a further accounting;

(13) Any debt by David Kinnard, Roger Kinnard or Springfield Holding to Dr. Robert L. Stone has been fully repaid. For the reasons set forth herein, judgment shall be entered in favor of the Plaintiffs and against Defendants.

IT IS SO ORDERED this 25th day of August 2008.

[s] DavidL.Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT JUDGE

Case 5:07-cv-00250-R Document 115 Filed 08/25/208

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID H. KINNARD et al.,	)	
	)	
Plaintiffs,	)	
v.	)	**CIV-07-250-R**
	)	
ROBERT L. STONE;	)	
CYNTHIA A. STONE; and	)	
ROBERT L. STONE, M.D.,	)	
	)	
Defendants.	)	

JUDGMENT

In accordance with the Court's findings of Fact and Conclusions of Law, entered this same date, the Court hereby enters the following judgment in favor of the Plaintiffs and against Defendants.

(1) As of March 5, 2004, Robert L. Stone owned no interest in Cinnamon Creek;

(2) As of June 10, 2004, Robert L. Stone owned no interest in Peppertree Partners;

(3) As of November 16, 2004, Robert L. Stone owned no interest in Windrock Associates;

(4) As of April 7, 2005, Robert L. Stone owned no interest in Springfield Village Apartments;

(5) As of March 1, 2005 Robert L. Stone owned no interest in Summer Pointe Partners;

(6) As of April 11, 2005, Cynthia Stone owned no interest in Summer Pointe Partners.;

(7) The Stones received reasonable consideration for their interests in the above-listed entities, as agreed upon by the parties;

(8) David Kinnard, the purchaser, provided reasonable consideration for the Stones' various interests;

(9) All of the parties ignored the requirement of Springfield Village that written consent of a majority of the members be obtained before loans could be made, thus this requirement was waived;

(10) Robert L. Stone, during his time as an owner of the various Oklahoma Investment Group entities, received money in excess of his distributive share of the income of the entities;

(11) Although David Kinnard promised to pay Robert L. Stone a minimum amount monthly, the failure to pay amounts in 1999 and 2000 did not create a debt from Oklahoma Investment Group or any of its entities; these amounts, to the extent they exceeded the Stone's distributive shares, were advances, creating accounts receivable in favor of the entities, as consolidated in favor of Springfield Village;

(12) David Payne performed a full accounting of the entities, utilizing accepted principles of forensic accounting, his results are not undermined by the absence of general ledgers for the period prior

to 2000, and thus Defendants are not entitled to a full accounting;

(13) Any debt by David Kinnard, Roger Kinnard or Springfield Holding to Dr. Robert L. Stone has been fully repaid.

ENTERED this 25th day of August 2008.

[s] David L. Russell
DAVID L. RUSSELL
UNITED STATES
DISTRICT COURT

Case: 08-6210 Document: 01018100618 Date Filed: 07/15/2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SPRINGFIELD HOLDING COMPANY LTD LLC,
Plaintiff - Appellee, and
MARK W. REINITZ, et al.,
Plaintiff-Counter-Defendants - Appellees,

v. **No. 08-6210**

ROBERT STONE, M.D., et al.,
Defendant-Counter-Claimants - Appellants.

ORDER

Before **KELLY**, **LUCERO**, and **HARTZ**, Circuit Judges.

Appellants Robert L. Stone and Cynthia A. Stone's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

[s] Elizabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

Case: 08-6210 Document: 09615437 Date Filed: 11/26/2008

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Robert L. Stone et al.,	)	
Appellants,	)	
	)	
	)	
v.	)	**Case No. 08-6210**
	)	
David H. Kinnard et al.,	)	
Appellees.	)	
	)	

On Appeal from: United States District Court for the Western District of Oklahoma
The Honorable Judge Russell
CIV-07-250-R

APPELLANTS' JOINT OPENING BRIEF

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Oral Argument is requested.

Scanned PDF attachments are included with digital submission via e-mail.

November 26, 2008

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PRIOR OR RELATED APPEALS

None.

STATEMENT OF JURISDICTION

The United States District Court for the Western District of Oklahoma had jurisdiction over this matter pursuant to 28 U.S.C. §§ 1332 and 1367. The District Court conducted a non-jury trial. After the trial, the District Court entered a final judgment in favor of David Kinnard, Roger Kinnard, et al. (here-

after "the Kinnard Brothers"), the Plaintiffs/Counter-Defendants below, which addressed all claims by and against all parties. (Attachment 1)

The Stones timely filed their Notice of Appeal, in accordance with 28 U.S.C. § 2107 and Fed.R.App. 4(a)(1)(A), on September 23, 2008. (Aplt.App. at 1485-1488) The appellate court's jurisdiction in the case at bar derives from 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. THE DISTRICT COURT ERRED, AS A MIXED QUESTION OF LAW AND OF FACT, IN CONCLUDING THAT THE ASSIGNMENTS DRAFTED BY DAVID KINNARD COULD HAVE BEEN PART OF A VALID AGREEMENT, BECAUSE THERE WAS NO MEETING OF THE MINDS.

2. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT DAVID KINNARD PAID VALID CONSIDERATION FOR THE STONES' PROPERTY.

3. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT MINORITY MEMBERS OR PARTNERS MAY UNINTENTIONALLY WAIVE THEIR RIGHTS

UNDER THEIR OPERATING AGREEMENTS AND UNDER THE OKLAHOMA UNIFORM PARTNERSHIP ACT.

4. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN GRANTING AN EQUITABLE REMEDY TO A PARTY THAT IT FOUND TO HAVE COME TO COURT WITH UNCLEAN HANDS.

5. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN HOLDING THAT MINORITY PARTNERS DO NOT HAVE A RIGHT TO AN ACCOUNTING.

STATEMENT OF THE CASE

On March 31, 2006, the Stones sued David Kinnard and Roger Kinnard (hereafter, "the Kinnard Brothers"), who are multi-millionaire investors with interests in Chicago, New York, and Russia, in Bankruptcy Court in Chicago, in Adversary Proceeding 06 A 00897, *The Children's Fund v. David Kinnard* et al. (N. D. Ill.), alleging breach of contract and asking for an accounting. Therein the Stones alleged that the Kinnard Brothers are 2/3

majority partners, and the Stones are 1/3 minority partners, in Oklahoma Investment Group (hereafter "OIG"), a real-estate partnership which controls about 550 rental units in Norman and Oklahoma City, in which the Stone family invested the life savings of three generations. The Stones alleged that in 2004 the Kinnard Brothers promised a $200,000 loan to the Stones if the Stones would guaranty the loan by assigning to David Kinnard a security interest in the Stone's shares in the properties controlled by the OIG partnership, that the Kinnard Brothers alone drafted the loan documents, that the Stones came to the "closing" with the documents signed at the request of the Kinnard Brothers, that the Kinnard Brothers promised to come with a $200,000 check, and that at the closing the Kinnard Brothers took the signed documents and disbursed only a small part of the loan. Then

they declared that the loan documents were "sales." The Kinnard Brothers then changed the title to the Stones' property without their written consent. The Stones in their complaint alleged fraud. The Kinnard Brothers answered by denying all of the Stones' allegations. On January 10, 2007, Case 06 A 00897 was dismissed for want of subject-matter jurisdiction in Chicago because real estate is a "local" matter under 28 U.S.C.S. § 1332, and most of the real estate controlled by OIG is in Oklahoma.

On February 28, 2007, the Kinnard Brothers, together with Springfield Apartments, one of the subsidiaries of the OIG partnership, and Mark Reinitz, one of the employees of the OIG partnership, filed the underlying case CIV-07-250-R in the United States District Court for the Western District of Oklahoma, asking for a declaratory judgment that the Stones have no interest in their

property. (Aplt. App. at 323-334) On April 2, 2007, the Stones Counterclaimed, asking for an accounting and for a Declaratory Judgment determining ownership rights over their property. (Aplt.App. at 335-344)

Before trial, on December 4, 2007, the Stones filed a Motion to Compel, alleging that David Kinnard, the only Managing Partner (Aplt.App. at 462), was not producing many of the partnership documents (which only he controls). (Aplt.App. at 177-319) On January 30, 2008, the District Court denied the Stones' motion as to "all appraisals of the Stones' property, any corporate or partnership authorizations or resolutions for any notes or mortgages for the Partnership, all general ledgers, all journals of original entry, all check registers and bank statements, all general journal entries and adjustments for the Partnership, and all tax returns

filed by the Kinnard Brothers." (Aplt.App. at 345-353) On February 1, 2008, (four and ½ months before the trial) the Stones filed a timely motion to Amend their Counterclaim, alleging new evidence of large-scale embezzlement by the Kinnard Brothers that came to light during discovery. (Aplt.App. at 354-371) On February 25, 2008, the District Court denied that motion also. (Aplt.App. at 372-374) Then on April 18, 2008, the Stones for the second time filed a motion to compel discovery: a Motion to Compel Access to Books and Records (Aplt.App. at 375-387), attaching an affidavit from their expert witness saying that he did not have sufficient information to testify adequately at trial and that he believed that the Defendants were withholding evidence. (Aplt. App. at 383-385) On April 24, 2008, the District Court denied that motion also. (Aplt.App. at 388-389)

At trial, June 17 through 20, 2008, each side offered into evidence the corporate documents, spreadsheets showing the history of payments from OIG to the Stones (Aplt.App. at 415-416), the Monthly Distribution Agreement between the parties (Aplt. App. at 91), transmission verifications from OIG's bank (Aplt.App. at 92-93, 135-37, 140, 143-46, 148-51, 155, 157, 170, and 172), contested assignments (Aplt. App. at 131, 142, 147, 153, 161-62, and 171), and voluminous e-mail and paper correspondence between the parties and among the Kinnard Brothers.

Each side in addition presented the testimony of an accountant as an expert witness. Both experts shared information with one another. There was substantial agreement between the expert witnesses on the fact that OIG sent monthly payments to the Stones from 2000 until after the loan documents

were signed in April, 2005 (Aplt.App. at 415). However, both experts lacked adequate information to testify as to what payments were made before 2000, because the District Court had denied the Stones' motions to compel discovery. (Aplt.App. at 345-53, 388-89) Therefore, there was no way they could determine what the total payments were and therefore whether they met OIG's total obligation under the Monthly Distribution Agreement, much less consideration paid on top of that.

On August 25, 2008, the District Court entered final judgment in favor of the Plaintiffs on both counts of the Complaint and against the Defendants on all counts of the Counterclaim. Attachment 1.

STATEMENT OF THE FACTS

A. *Origin of the Dispute*

This case has its origins in a friendship and partnership between Roger Kinnard and Robert L. Stone, beginning when they were university students together about 1975. (Aplt.App. at 551, 1216-1218) From 1980 to 2004, they formed several successful joint business ventures and developed a high level of mutual trust. (Aplt.App. at 1217, 1223-24, and 1387) One of those successful joint business ventures was Oklahoma Investment Group ("OIG"), which they formed in 1989, by both oral and written agreement, to purchase, manage, and sell apartment complexes and office buildings in Norman and Oklahoma City. (Aplt.App. at 1217-1220) OIG was founded as a 50-50 equal general partnership using Roger Kinnard's contacts and about $50,000

provided by Roger Kinnard, together with about $750,000 in funds provided by the Stone family. (Aplt.App. at 1218) The Stones put their life savings into OIG. (Aplt. App. at 1285) The apartment complexes included Summer Pointe Apartments, Peppertree Condominiums, Springfield Apartments, Cinnamon Creek Apartments, and Windrock Apartments in Norman (hereafter, "the OIG Properties"), which together include about 550 rental units. Each complex is owned by the OIG partners through a separate subsidiary partnership or corporation, each of which has its own partnership agreement or operating agreement. (Summer Pointe, Aplt.App. 17-50; Peppertree, Aplt. App. at 51-68; Springfield, Aplt.App. at 69-89; Cinnamon Creek, Aplt.App. at 102-123; Windrock, Aplt.App. at 124-129) The two friends worked as managers of OIG and later hired Roger Kinnard's brother, David

Kinnard, as a full-time manager. (Aplt.App. at 1217, 1222) Since OIG began as a startup that could not afford to pay a manager's salary, and because of Stone's trust of Roger Kinnard, the shares were changed so that David Kinnard was paid with a one-third share of the partnership, giving the Roger Kinnard 1/3 and the Stone family 1/3 of the OIG partnership and its subsidiaries. (Aplt.App. at 1222) In November of 1989, the partners entered into an agreement entitled "Articles of Agreement for the Purchase, Management, and Sale of Real Estate." (Aplt.App. at 1290) The three general partners share equally in the ownership of, and distributions from, the various OIG Properties. (Aplt.App. at 1219, 1218-20)

In late 1995, the Stones and the Kinnard Brothers orally agreed to amend their respective duties and obligations in the OIG partnership to

allow the Stones to move to the City of Chicago to pursue the acquisition of Beatrice Associates, another joint venture with the Kinnard Brothers. (Aplt.App. at 1222, 1225-31) The essence of the amended agreement was the Stones, on the one hand, agreed to become non-managing partners, to allow David Kinnard to become the sole managing and operating partner of the OIG partnership and its subsidiaries (Aplt. App. at 462, 685), and to allow the Kinnard Brothers to purchase Stone's interest in the Physicians and Surgeons Building, another property controlled and owned by the OIG partners, for a below-market price. (Aplt.App. at 1226-1228) The Kinnard Brothers, on the other hand, agreed, beginning on January 1, 1996, to cause the OIG partnership to pay to the Stones a guarantied monthly distribution, starting at $17,000.00 dollars and increasing by 3% each year thereafter, instead of

the prior 1/3 of profits, "for at least five years." (Aplt.App. at 554, 1202, 1226-27) On May 16, 1997, David Kinnard restated that agreement in writing (hereafter, the "Monthly Distribution Agreement," Aplt.App. at 91). (Aplt.App. at 567,619, 670, and 680-81) The Monthly Distribution Agreement provided for renegotiation at five-year intervals upon the agreement of both parties, provided that capital accounts will be maintained as normal, and did not allow the two Kinnard Brothers to refinance any of the OIG Properties without the Stones' consent nor to diminish the Stones' 1/3 equity therein. (Aplt.App. at 1161, 1193-95, 1202, 1225-26, 1288, 1303, 1349-50, 1357, and 1362) The OIG partnership then made monthly payments to the Stones at the rate specified in the Monthly Distribution Agreement most months through April of 2005, though they failed to make

the required payments in 1999 and at other times. (Aplt.App. at 1233)

In 1996, the Stones moved to Chicago. That same year, David Kinnard moved to Russia, where he spends most of each year on business ventures, managing the OIG partnership by telephone and e-mail with occasional visits to Oklahoma (Aplt.App. at 1225, 1248), while keeping the books and records of the OIG partnership, including the subsidiaries and the related properties, including receipts and disbursements. (Aplt.App. at 966) Since that time, at the request of Roger Kinnard, the Stones have communicated with the OIG partnership almost exclusively through Roger Kinnard. (Aplt.App. at 855-56, 956, 1233-34, and 1334) Also in 1996, the Stones borrowed from the Kinnard Brothers individually $305,000 for use in the joint venture in Chicago, (Aplt.App. at 633-34, 1115) In 1998, the

Stones repaid that loan in full to the Kinnard Brothers individually, plus interest, for a total of $366,956.32. (Aplt.App. at 633-34, 1115)

In 1999, the Kinnard Brothers caused the OIG partnership to fall behind in its monthly distributions to Stone by approximately $200,000. (Aplt.App. at 638). As a result, Stone demanded both an accounting and that the OIG partnership pay him the arrears. (Aplt.App. at 1201-02) Although the Kinnard Brothers resumed payments in 2000, this OIG arrearage persisted and has not been resolved.

By December 31, 2002, the OIG partnership was still making payments under the Monthly Distribution Agreement but had fallen behind in the amount of $408,684. (Aplt.App. at 415) In spite of repeated requests by the Stones to Roger Kinnard, the Kinnard Brothers did not provide even a partial

accounting until compelled to do so during the discovery phase of the underlying case. (Aplt.App. at 1237) Roger Kinnard always told the Stones that David Kinnard was too busy in Russia and Mark Reinitz (an employee of OIG) was not able to do accounting, but they were working on it. (Aplt.App. at 1237). To date they still have provided no accounting of the time period before the year 2000 (Aplt.App. at 1066, 1133, and 1165) which represents ap-proximately 2/3 of the period of the OIG partnership and includes much of the amount in ar-rears under the Monthly Distribution Agreement. (Aplt.App. at 91, 415).

Around the beginning of 2003, Robert Stone requested of Roger Kinnard that the OIG partnership come current in its arrearage, but Roger Kinnard told Stone that OIG could not yet do so. (Aplt.App. at 1240) In fact, the OIG partnership at

that time had ample resources to pay its arrearage. David Kinnard testified at trial that the two Kinnard Brothers had borrowed approximately $2 million dollars from Springfield. (Aplt.App. at 967, 977, 986, and 1240)

Because the Kinnard Brothers refused to cause the OIG partnership to come current on its payments, the Stones, in February of 2003, sought to borrow $100,000 from David Kinnard individually for another business venture and to secure that loan on the Stones equity share in the OIG Properties. (Aplt.App. at 1239) David Kinnard agreed to the loan and required that the Stones guaranty the loan by transferring to David Kinnard a security interest in Cinnamon Creek, one of the properties owned jointly by the three partners. (Aplt.App. at 131) David Kinnard, through Roger Kinnard, promised that, if the Stones signed, the Kinnard Brothers

would provide another document stating the terms of the loan, including the interest rate and the term of repayment, and would make the loan. (Aplt.App. at 1242-44, 1366) On March 27, 2003, the Stones assigned to David Kinnard a security interest in Cinnamon Creek. (Aplt.App. at 1119, 1241-42) In return, the Kinnard Brothers never provided the second document stating the terms, but on March 28, 2003, they did provide the $100,000 loan as consideration, and the Stones repaid the loan with $30,000 interest (Aplt.App. at 623, 1244) on September 26, 2003. (Aplt.App. at 622, 1119, and 1339) Documentation was casual and "seat of the pants." (Aplt.App. at 1030) This was a constant problem and frustration for the Stones dealing with the Kinnard Brothers. The Stones requested better paperwork, but the Kinnard Brothers controlled the OIG partnership's income, accounts, and paperwork and

refused to provide the requested paperwork. (Aplt. App. at 1277-79, 1284, 1303, 1359, and 1367-68) Because the 2003 loan was a loan and not a sale (Aplt.App. at 1211) plus re-conveyance, there was no re-conveyance. (Aplt.App. at 623)

During the discovery phase of the case at bar, Defendants learned for the first time that the $100,000 for the 2003 loan to the Stones came not from David Kinnard but from the Springfield subsidiary (Aplt.App. at 532-538, 856, 1084, 1108, 1112, 1114, 1119, 1239, and 1244), which, contrary to what Roger Kinnard told the Stones at the time, actually had a surplus. (Roger Kinnard had "borrowed" $1.8 million from OIG/Springfield. Aplt.App. at 1079, 1391) Springfield is owned 1/3 by the Stones. (Aplt.App. at 89, 601) So David Kinnard took for himself the $30,000 interest on the loan to the Stones for doing nothing more than lending the

Stones money that was 1/3 theirs already and that was already owed to them. And, by his own admissions, he did so without the consent of 75% of the partners in Springfield as required by the Springfield Operating Agreement. (Aplt.App. at 75, 485-86, 725-26, and 976)

B. ***The Dispute***

As of January 1, 2004, the Kinnard Brothers had caused OIG to fall into arrears and become indebted to the Stones, pursuant to the Monthly Distribution Agreement, in the amount of $468,320.00. (Aplt.App. at 415) In February of 2004, the Stones, instead of suing a friend, sought to borrow $200,000 from David Kinnard individually to make up some of the deficit and to expand the new business venture in Chicago. (Aplt.App. at 1193, 1365) In return for the Stones' refraining from suing, David Kinnard, through Roger Kinnard, agreed to

the loan, and to come current on the monthly distributions--- if the Stones again would guaranty the loan with assignments of the Stones' shares in the OIG Properties, using the same loan-securitization document which the Kinnard Brothers had used for the 2003 loan (Aplt.App. at 1247-48, 1261) The form was provided by the OIG's partnership outside counsel, Phillips McFall McCaffrey McVay & Murrah P.C., to their clients for use with loans with interest rates in excess of that permitted by the Oklahoma Usury Statute. (Aplt. App. at 597, 623, 1284, and 1302) The Stones agreed.

On March 1, 2004, the Kinnard Brothers sent the first of the new assignments for the Stones' shares in Cinnamon Creek (the same property used for the 2003 loan). (Aplt.App. at 131, 142) On March 3, 2004, the Stones executed this guaranty and sent

it back to the Kinnard Brothers. As in 2003, the Kinnard Brothers said that they would send the terms of the loan (including interest, repayment schedule, and provisions in case of default) later, and that was not a problem because everything was understood among friends. (Aplt.App. at 1240-41) On March 5, 2004, the Kinnard Brothers sent a $45,000 advance on the promised $200,000 loan. (Tr. Aplt.App. at 1248, 1257-59, and 1266) The Kinnard Brothers then said that they would pay out the balance of the promised loan and reduce the amount they were in arrears under the Monthly Distribution Agreement, and provide the documents with the missing terms---as soon as they were able to do so and after the Stones signed the remaining four assignments. (Aplt.App. at 1274, 1284) The Stones signed the remaining assignments promptly as they were prepared and sent to the them by the Kinnard

Brothers, from June 10, 2004, through April 8, 2005. Meanwhile, the OIG partnership was making the monthly payments under the Monthly Distribution Agreement and even reducing its arrearage, to $274,000 by March of 2004, by paying slightly more each month than was due under the Monthly Distribution Agreement. (Aplt.App. at 415)

Finally, on March 1, 2005, David Kinnard sent to Robert Stone the last and most important of his assignment documents (including Springfield; the largest of the OIG Properties) for him to sign, with the following cover letter:

> From: David Kinnard
> To: Robert Stone
> Date: March 1, 2005
> "Rob, Just talked to mark and ted. we'll send you 20K today if you sign the 4 docs they mentioned to me. we'll send the remaining next week pending review of **guaranties** etc in the **loan docs** by lovelace. Dave." [sic]
> [emphasis added] (Aplt.App. at 159)

Robert Stone signed and returned all of his remaining "guaranties" and "loan docs" the same day, but the Kinnard Brothers still did not send the loan proceeds. On March 10, 2005, Roger Kinnard told the Stones that David Kinnard would fund the loan if Robert Stone would sign the "Promissory Note" (Aplt.App. at 163-64) to Bernice Kinnard, the Kinnard Brothers' mother (hereafter "Mrs. Kinnard"), which provided that Robert Stone would arbitrate an alleged debt to Mrs. Kinnard and then pay the amount determined by the arbitrators. On March 11, 2005, Robert Stone signed and returned the proposed Note. The Kinnard Brothers still did not make the promised loan. (Aplt.App. at 415,1207, 1262, and 1288) On or about March 15, Roger Kinnard told the Stones that Mrs. Kinnard had rejected the proposed Note and had demanded immediate payment instead, which the Stones

refused (Aplt.App. at 164, 460), because they believed that they owed nothing to Mrs. Kinnard and that this would come out in arbitration.

On or about March 16, 2005, Roger Kinnard sent to the Stones another proposed Note ("the Beatrice Note," Aplt.App. at 168-69), this one in favor of Roger Kinnard and David Kinnard, agreeing to arbitrate a dispute about Beatrice Associates, another investment between the Stones and the Kinnard Brothers in Chicago, and to pay the amount decided by the arbitrator. Again, Robert Stone signed and returned the proposed Beatrice Note the same day. On or about March 30, Roger Kinnard informed the Stones that David Kinnard had refused to sign the "Beatrice Note," at demanding immediate payment instead, which the Stones again refused. (Aplt.App. at 169, 460) On April 11, 2005, Roger Kinnard caused the OIG partnership to send the

Stones $35,000 of the promised $200,000 loan. (Aplt.App. at 170) The Kinnard Brothers sent no more payments.

The Kinnard Brothers never provided most of the promised $200,000 loan (Aplt.App. at 415, 1207, 1262, and 1288) and never camé current in the monthly distribution payments due under the Monthly Distribution Agreement. Instead, on April 11, 2005, the Kinnard Brothers claimed that the "guaranties" and "loan docs" that they had induced the Stones to sign were actually "sales." (Aplt.App. at 1288) They then cut off permanently the monthly distributions to the Stones from the OIG partnership, unilaterally changed the title of all of the OIG properties to remove the Stones' name without the Stones' consent, and gave the Stones' 1/3 share of the OIG partnership and the OIG properties to David Kinnard. (Aplt.App. at 1197, 1280) The

Stones then in a timely manner protested strongly to Roger Kinnard and demanded reinstatement of their stolen shares. (See, for example, Letter from Cynthia A. Stone to Roger Kinnard, Aplt.App. at 173-176.)

Throughout this time period, there were numerous communications to the Stones from Roger Kinnard and his employees discussing the loan and agreeing that it was a loan. (Aplt.App. at 658-59, 665-66, 671-72, 679, 701, 1193-94, 1242-47, 1255, 1257-58, 1262-1266, 1273, 1280-84, 1286, and 1321) Roger Kinnard agreed that amounts paid by OIG to the Stones that year were to be considered distributions if OIG turned out to be in arrears after the promised accounting was provided, and loans if the promised accounting showed that OIG was not in arrears. (Aplt.App. at 166) They never provided an accounting. There was never any discussion by Roger Kinnard or David Kinnard with the Stones of

a sale until after the last of the loan documents was signed and the trap was sprung. (Aplt. App. at 1211, 1285)

C. *Testimony at Trial*

At trial, David Kinnard testified that he had paid $1,500,000, in cash and forgiveness of debts, over a period of 4 years, from May 17, 2001, through April 11, 2005, (Aplt.App. at 472) to the Stones to purchase their shares, and that the Stones had sold their shares to him by signing the six assignments, although he did not deny the authenticity of his e-mail cover letter at the time describing them as "guaranties" and "loan docs." (Aplt.App. at 159) David Kinnard testified further that he had never spoken with the Stones directly about the purchase of their shares but had negotiated the entire transaction exclusively through his employees, Mark Reinitz and Ted Teske. (Aplt.App. at 494) One of the

employees admitted under cross examination that the employees worked together to deceive the Stones on April 8, 2005, while negotiating the assignments. (Aplt.App. at 759-762)

The employees testified that the Stones had signed the assignments; that the assignments do not contain a price term; that the price term was filled in later by David Kinnard because the Stones' agreement to sell their shares was oral; and that there is no written record of it; and that they told the Stones the assignments were for sales. Furthermore, the employees testified that they had caused the OIG partnership to send regular monthly payments to the Stones from 1996 to 2005; and one employee actually testified that David Kinnard, after the assignments were signed, retroactively "reclassified" payments in the OIG books to appear as purchase payments. (Aplt.App. at 777)

Mr. and Mrs. Stone, on the other hand, testified that they had made no agreement to sell; that their shares were never for sale; that the promised loan was negotiated exclusively between the Stones and their friend, Roger Kinnard, who had asked the Stones to deal with him alone (Aplt.App. at 667, 1235-36, 1246, and 1316); that Roger Kinnard had induced the Stones to sign the assignments that were sent to them by David Kinnard by telling them that they were "guaranties" and "loan docs" for the promised $200,000 loan (Aplt.App. at 1239) that was never fully funded (Aplt.App. at 141); that David Kinnard had confirmed in writing in his e-mail "cover letter" for the assignments that they were "guaranties" and "loan docs" (Aplt.App. at 159); that the monthly payments mentioned by the employees as payments for sales were for something entirely different

(distributions of the Stones' share of profit from OIG under the Monthly Distribution Agreement, Aplt.App. at 91); that David Kinnard, the only beneficiary of the assignments, had paid nothing to any of the Stones for anything; and that, from 2001 through 2005, the Stones had been paid nothing more than the monthly distributions of profit that they were due anyway under the OIG partnership agreement, under the organizational documents of the subsidiaries, and under the Monthly Distribution Agreement, and in fact had been paid less. (Aplt.App. at 91) The Stones admitted that the employees on two occasions (out of dozens in which they used the word "loan") had used the word "sale" in e-mail messages to the Stones. When they did that, Robert Stone immediately called Roger Kinnard and questioned him. Roger Kinnard told Robert Stone that those employees were "crazy" and

did not know what they were talking about, so please ignore them. (Aplt.App. at 1235-36) The Stones did so, as they negotiated the loan solely with Roger, with his employees acting as his secretaries.

Throughout, the Stones testified that the only transaction they negotiated was the proposed loan and that they negotiated it exclusively through Roger Kinnard, David's older brother and their friend of 30 years. (Aplt.App. at 494, 1248, and 1348) The Stones never agreed to a sale of any kind.

In rebuttal, Roger Kinnard refrained entirely from testifying---although he was present in the courtroom throughout the trial.

SUMMARY OF THE ARGUMENT

1. The District Court erred in holding that Assignments were part of valid agreements because there was no meeting of the minds. The parties did not even agree as to the nature of the transaction;

the Stones believed the assignments were securitization of loans while David Kinnard testified that he believed they were an outright conveyance pursuant to a sale. Even if the parties had agreed to the "same thing," a loan or a sale, there still was no meeting of the minds as to the remainder of the essential terms. The party seeking to enforce a contract has the burden of showing a meeting of the minds as to all essential terms of the contract. Assuming arguendo, the assignments were part of a sale, there still must be a price term; but there was not. Without an agreement of the parties as to the essential nature of the transaction and the essential terms thereto, any potential agreement fails.

2. The District Court erred in holding that David Kinnard paid valid consideration for the assignments. David Kinnard claims as consideration both the forgiveness of two notes and funds borrowed

from Springfield. Neither note may serve as consideration for the assignments. One note is a debt to a third-party (that was rejected by that third party), and the other is a debt to David and Roger Kinnard jointly (that was not accepted by them). David Kinnard cannot forgive debts which are not owed to him. Moreover, adequate consideration requires the receipt of a present benefit, but the notes were not even drafted until **after** the "loan docs" were executed. Additionally, at the time of the assignments, the notes' values were uncertain as they were to be ascertained months later through arbitration and therefore could not serve as consideration.

Additionally, the cash payments purportedly made to the Stones also cannot serve as consideration because David Kinnard testified that he acquired the funds by taking a loan from the

Springfield subsidiary in violation of its Operating Agreement. To obtain a loan from Springfield he would have needed unanimous written consent from the other members (including Robert Stone), which he admits he did not have. As a matter of law, actions taken by an LLC member in contravention of the LLC Operating Agreement are null, void and of no effect, and all subsequent transactions must be unwound.

3. The District Court erred in concluding that the Stones waived their rights under Springfield's Operating Agreement and under the Oklahoma Uniform Partnership Act when they purportedly failed to object to David Kinnard's making a personal loan to himself in violation of an express provision of that Operating Agreement. The District Court held that the Stones previously in 1998 failed to object when David Kinnard similarly violated

Springfield's Operating Agreement. Aside from the fact that Mr. Stone didn't know about David Kinnard's violations, any purported failure to object is irrelevant, because under the Springfield's Operating Agreement, "[n]o failure by any party to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement or condition." See Section 13.4 of Springfield's Operating Agreement. (Aplt.App. at 88).

Likewise, the Oklahoma Uniform Partnership Act imposes a fiduciary duty on all partners, and this duty may not be waived under any circumstance. This duty includes: (1) the right to an accounting, including "full and frank" disclosure, (2) the right to be treated as the beneficiary of a

fiduciary trust, with the managing partner as the trustee, (3) the right, in case of a dispute between a managing partner and a non-managing partner, to enjoy the advantage that the managing partner has the burden of proof.

4. The District Court erred in granting an equitable remedy to a party whom it has found to have come to court with unclean hands. David Kinnard refused to provide an accounting, took secret "loans" to himself and his brother, defrauded his non-managing partners, violated his fiduciary obligations, and failed to show that he acted reasonably. In the face of these violations, David Kinnard came to a court of equity with unclean hands, asking that it give him the spoils of his misconduct by way of a declaratory judgment. The District Court erred in doing so.

5. Under the Uniform Partnership Act, and under the operating agreements, all (especially non-managing) partners and members have an unqualified right to an accounting at any time; the District Court erred in denying the Stones' request for an independent accounting, which would have further illuminated the extent of David Kinnard's misconduct.

ARGUMENTS AND AUTHORITIES

1. THE DISTRICT COURT ERRED, AS A MIXED QUESTION OF LAW AND OF FACT, IN CONCLUDING THAT THE ASSIGNMENTS DRAFTED BY DAVID KINNARD COULD HAVE BEEN PART OF A VALID AGREEMENT, BECAUSE THERE WAS NO MEETING OF THE MINDS.

A. The Standard of Review is "clearly erroneous."

A district court's conclusions of law are reviewed by a court of appeals "de novo." In "de novo" review, "no form of appellate deference is acceptable." *Beaver v. Clingman*, 363 F.3d 1048, 1053 (10th Cir. 2004). On the other hand, "Findings of fact . . . must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Fed.R.Civ. P. 52(a)(6). Mixed questions of law and fact may be reviewed under either the "de novo" or the "clearly erroneous"

standard. The choice between these two standards will be determined by "whether the mixed question involves primarily a factual inquiry of the consideration of legal principles." *Naimie v. Cytozyme Laboratories, Inc.*, 174 F.3d 1104 (10thCir. 1999) (existence of contract). As a matter of law, there must be a meeting of the minds for there to be a contract of any kind. *O'Neal v. Harper*, 75 P.2d 879, 882 (Okla. 1937). But whether there was a meeting of minds is a question of fact. Since this inquiry is primarily factual, the standard of review is "clearly erroneous."

B. The Assignments Cannot be Part of Valid Agreements of Any Kind because there Could have been No Meeting of the Minds.

The Plaintiffs argued that the bare fact that the assignments contain the words "assignment" and

"sale" and were signed means that the Kinnards and the Stones had a "meeting of the minds" and that a "sale" was consummated. But this is far from the truth. There was no meeting of minds. The parties did not even agree as to the essential nature of the transaction. "In order to have a valid contract there must be mutual consent, or a meeting of the minds . . . , [t]he consent of the parties must be mutual, and consent is not mutual unless the parties all agree upon the same thing in the same [sense]. Because the parties did not agree upon the same thing in the same sense, there was no mutual consent, and thus no contract." *Beck v. Reynolds*, 903 P.2d 317, 319 (Okla. 1995). (Internal citations omitted). *See also*, 15 Okl. St. § 66 ("Consent is not mutual unless the parties all agree upon the same thing in the same sense").

The "sale" was a complete shock to the Stones, perpetrated by fraud on the part of the Kinnards. When the Kinnard Brothers announced a unilateral "sale," the Stones in a timely manner protested strongly to Roger Kinnard and demanded reinstatement of their shares. (For example, see Letter from Cynthia A. Stone to Roger Kinnard, Aplt.App. at 173-76.) Only at the trial, three years after the taking, did the Stones learn how much David Kinnard claimed he supposedly had paid them for their shares. At his deposition before the trial, he himself had no idea how much he supposedly had paid. During the trial, David Kinnard produced, for the first time, the number $1,500,000. However to this day it is not at all clear how that number was calculated.

What is the contemporary evidence that the Stones were surprised? First, both Roger Kinnard

(Aplt.App. at 658, 667, and 701) and then David Kinnard (Aplt.App. at 159) said, dozens of times, both orally and in writing, that the assignments were the first half of **loan**-guaranty documents, and that the second halves would follow soon. (Aplt.App. at159, 1366-68) Neither Roger Kinnard nor David Kinnard **ever** referred to "sale" documents in any correspondence with the Stones---until after the assignments were signed and the trap was sprung. The following message is from David Kinnard himself, the Managing Partner (Aplt.App. at 462) and so-called "purchaser" of the assignments, in his "cover letter" to the most important assignments. (Note: the "20K" refers to monthly distributions which OIG was making during and after the signing process.)

From: David Kinnard
To: Robert Stone
Date: March 1, 2005

> "Rob, Just talked to mark and ted. we'll send you 20K today if you sign the 4 docs they mentioned to me. we'll send the remaining next week pending review of **guaranties** etc in the **loan docs** by lovelace. Dave." [sic] (Aplt.App. at 159) (emphasis added)

The Kinnard Brothers do not deny that they never produced the "remaining" second halves. Then, here is Roger Kinnard, the one who negotiated the fraud with the Stones:

> Date: September 14, 2004
> From: Roger Kinnard
> To: Mark Reinitz, Robert Stone, and David Kinnard
>
> "Mark, Rob would like a **loan**. Dave has agreed to **lend** Rob $21,000 and this needs to be sent tout suite." (emphasis added) (Aplt.App. at 154, 702-03)

> Date: July 14, 2004
> From: Roger Kinnard
> To: David Kinnard, Mark Reinitz, Ted Teske
>
> "Now, if the $45,000 that was **borrowed** four months ago is secured by SP, then I recommend that we allow Rob to buy back SP and do a new agreement for the 45,000 plus **interest** and that be added to the 5,000 plus **interest** on the 35,000 – 8.9 and rolled

> into a new **loan**." (emphasis added)
> (Aplt.App. at 664-66)

In fact, contemporary communications between Roger Kinnard and his employees shows in writing that Roger Kinnard was attempting to deceive the Stones:

> Date: April 16, 2003
> From: Mark Reinitz
> To: Roger and Dave Kinnard
>
> > "By calling it a **loan** in our email to Rob, you have given Rob a weapon to use against us in at least 2 ways: (1) if a **loan**, we would have to return the CC "security" to Rob upon his payment of your . . . specified amount, so that the Lovelace partnership transfer agreement would be voided, another bad precedent. (2) As a **loan**, it would be in probable violation of Oklahoma usury laws. . . . We have not drafted an option agreement for Rob to buy back the CC share . . ., and so such an agreement has not been signed . . . . Why didn't you call us first? **You let him off too easy. CC is/was a lever**." (emphasis added)
> > (Aplt.App. at 132, 971)

Both Robert Stone and Cynthia Stone **always** referred to "loan" documents in their correspondence with the Kinnard Brothers. (Aplt.App. at 624, 711, 714) Here is Robert Stone:

> Date: August 12, 2004
> From: Robert Stone,
> To: Dave Kinnard
>
> "I propose you send me $25,000 as part of the **loan** we have already agreed upon in principal. Total amount when available: $100,000, 36 **percent** from dates of disbursement." (emphasis added)
> (Aplt.App. at 700-01)

> Date: October 21, 2004
> From : Robert Stone
> To: David Kinnard, Mark Reinitz, Roger Kinnard
>
> "This is a request pursuant to my **loan agreement** with Oklahoma Investment Group. OIG sent to me $20,000 on October 4, 2004. Please account for that $20,000 as an advance pursuant to **our loan agreement**."
> (emphasis added) (Aplt.App. at 133)

> Date: December 30, 2004
> From: Robert Stone,
> To: David Kinnard, Roger Kinnard, Mark Reinitz

> "I, Robert L. Stone, hereby agree to convey my full interest in Springfield to David H. Kinnard as **security for . . whatever I borrow** from OIG from this date forward . . . . (emphasis added) (Aplt.App. at 138-39)

Date: January 18, 2005
From: Robert Stone
To: David Kinnard, Mark Reinitz, Roger Kinnard

> "It seems that David Kinnard and I are near a final agreement on the **loan documents** . . . ." (emphasis added) (Aplt.App. at 156)

The Kinnard Brothers even admitted at trial that the Stones **always** referred to the assignments as "loans."

> "Robert Stone always called these things '**loans**.'" (emphasis added) --(Aplt.App. at 624)

Robert L. Stone testified that Roger Kinnard told him dozens of times during the loan negotiations that the loan documents were loan documents, and Stone's testimony about what Roger told him was confirmed at trial. (Aplt.App. at 658-67, 971) It is

very significant that the Kinnard Brothers did not even attempt to refute Robert Stone's testimony that Roger Kinnard negotiated the promised loan (Aplt. App. at 1235, 1348) and that Roger Kinnard told the Stones dozens of times that the assignments were to securitize a $200,000 loan. (Aplt.App. at 1207) On the contrary, Roger Kinnard conspicuously refrained from testifying at trial.

The second reason why the Stones were surprised by the alleged "sale" and believed that the assignments were "guaranties" and loan docs" is because their wording is consistent with loan documents. An "assignment" is a transfer of property. There are three kinds of transfers of property: (a) sales, (b) transfers to secure a debt, and (c) gifts. All three may contain the word "sale." It is the context that determines which kind of transfer one has in any given case. For example, Black's Law

Dictionary, 5th Ed., defines "assigned account" as "Pledge of account receivable to bank or factor as security for loan." Another example of an assignment that is a loan securitization is a mortgage. Mortgages, like assigned accounts, also recite the word "sale." Also, there is a very old and basic policy in the law to interpret any ambiguity in a document against the party who drafted it. "If we had any thoughts that the words of the contract should be stretched to cover these unanticipated contingencies, they are dispelled by our cognizance of the rule that ambiguities are resolved against the party who drafted the agreement." *Helitzer v. Helitzer*, 761 F.2d 582, 589 (10th Cir. 1985). David Kinnard alone drafted all of the assignments.

The third reason why the Stones were surprised by the alleged "sale" and believed that the assignments were "guaranties" and "loan docs," so

there could have been no meeting of the minds, is that the assignments are **identical** to the standard OIG loan form that the Kinnard Brothers had used to make a similar loan to the Stones in 2003. (Aplt.App. at 131) There, the Stones borrowed $100,000, signed the identical loan form securing the loan on Cinnamon Creek, and repaid the principal plus $30,000 interest. (Aplt.App. at 554-55) In 2004, another assignment of the same property, Cinnamon Creek, was one of the fraudulent assignments. (Aplt.App. at 142) The Stones say the 2003 transaction was a loan, and if it was, then the later transactions have to be loans, because the paperwork is identical. And the Kinnard Brothers' lawyer at the time said it was a loan. (Aplt. App. at 1365-68) The Kinnard Brothers, on the other hand, say that the 2003 transaction was a sale with a re-conveyance. The test of who is telling the truth in

this case is whether there was a re-conveyance. At trial, the Stones proved that there was not, and the Kinnard Brothers admitted that there was not. (Aplt.App. at 623)

The fourth reason why the Stones were surprised by the alleged "sale" and believed that the assignments were "guaranties" and "loan docs" is that, if the assignments had been sales, the monthly distributions under the Monthly Distribution Agreement would have decreased and then stopped as the assignments were signed. Instead, the payments continued undiminished during and after the time when the all the assignments were signed. That fact alone is conclusive of whether the assignments were sales or loan guaranties.

The fifth reason why the Stones were surprised by the alleged "sale" and believed that the assignments were "guaranties" and "loan docs," so

there could have been no meeting of the minds, is that there was no agreement as to a price term. Even if the parties had agreed to the "same thing," a loan or a sale, there still was no meeting of the minds as to the remainder of the essential terms. The party seeking to enforce a contract has the burden of showing a meeting of the minds as to all essential terms of the contract. *Navair, Inc. v. IFR Americas, Inc.*, 519 F.3d 1131, 1139 (10th Cir. 2008). To be a sale, there must be a price term. However, there is zero evidence that the parties had ever discussed a sale price, let alone agreed to a sale price. To the contrary, the Kinnard Brothers' own witnesses testified that David Kinnard decided retroactively to "reclassify" prior regular distributions to Stone as "payments" for the alleged sales. (Aplt.App. at 777)

The omission of a price term in each and every assignment was not inadvertent. It goes to the entire structure and sequence of the transaction. If one sells something, one negotiates a price with the buyer, then that is put into the contract, and then one is paid. In all the voluminous evidence, there is zero evidence that the parties had ever discussed a sale price before the assignments were signed (or after), let alone agreed to a sale price. It is settled law in the 10th Circuit that " . . . the contract could not be valid and enforceable if the price term were missing." *Lurch v. U.S.*, 719 F.2d 333 (10th Cir. 1983) As this Court will see below, the Kinnard Brothers claim that they filled in the missing price term later. The Kinnard Brothers' own employees testified at trial that David Kinnard decided retroactively to claim prior regular distributions to Stone as "payments" for the alleged sales. (Tr. 234)

It is not permissible for David Kinnard to fill in the missing, essential price term after the fact.

2. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT DAVID KINNARD PAID VALID CONSIDERATION FOR THE STONES' PROPERTIES.

A. The Standard of Review of a District Court's Conclusion of Law is "De Novo" Review.

The second issue before this Court is whether David Kinnard paid valid consideration for the Stones' interest in the OIG entities. The District Court concluded that forgiveness of two (rejected third-party) notes and funds taken from a partnership by its managing partner in violation of the operating agreement may serve as consideration for that partner's purchase of a minority partner's shares. Whether rejected, third-party notes and funds taken in violation of an operating agreement may serve as valid consideration are pure questions

of law, thus the standard of review is "de novo." *Beaver v. Clingman*, 363 F.3d at 1053.

B. Forgiveness of neither Mrs. Kinnard's Note nor the Beatrice Note can Serve as Consideration.

The Plaintiffs claim the bulk of the consideration for Springfield came from the forgiveness of two notes: the Mrs. Kinnard Note (Aplt.App. at 163-64) and the Beatrice Note. (Aplt.App. at 168-69) However, neither can serve as consideration for the Springfield assignment.

First, the Mrs. Kinnard Note is not valid because Mrs. Kinnard did not accept it and sign it. But, even if it were valid, it would be a debt to Bernice Kinnard. Bernice Kinnard is a third-party. David Kinnard had no right to forgive a note that was not his. There has been and is no evidence that the note

was ever assigned to David Kinnard or that he made any attempt to "forgive" the Mrs. Kinnard Note. Therefore, there was no detriment to David Kinnard and therefore no consideration.

Likewise, the Beatrice Note, even if it were valid and had been accepted and signed by the Kinnard Brothers (and it was not), would be a debt to both David and Roger Kinnard. David Kinnard had no right to forgive the note on behalf of Roger Kinnard. There has been and is no evidence that the Beatrice Note was ever assigned to David Kinnard or that he made any attempt to "forgive" it. (If Mrs. Kinnard were to sign it and accept it at some time in the future, it would be resurrected.) Therefore, there was no detriment to David Kinnard and therefore no consideration.

Moreover,

> [A]dequate consideration requires the receipt of a **present benefit** that reflects the fair market value of the property."
>
> --*Summum v. Duchesne City*, 82 F.3d 1263, 1272 (10th Cir. 2007). (Internal citation omitted, emphasis added).

The Springfield assignment was executed March 1, 2005. The Mrs. Kinnard Note was not executed until March 10, 2005, and the Beatrice Note was not executed until March 16, 2005. The alleged forgiveness of purported debts that didn't even exist on March 1, 2005, could not have served as consideration.

Additionally, "a benefit that is of uncertain value" cannot serve as consideration. *Id.* Even when the notes were executed several days later, they still did not have a certain value. The stated amounts in the notes were only to be the actual value of the notes if Mr. Stone did not proceed with arbitration,

which he did. When the notes were executed there was still a lengthy process of arbitration that was to occur to determine the actual amount of the alleged debt, if any. The value of the notes would not have been determined for several months after their execution and therefore were of uncertain value at the time the Plaintiffs claim they served as consideration.

C. Funds Borrowed by David Kinnard from Springfield, in Violation of its Operating Agreement Cannot Serve as Valid Consideration.

The Kinnard Brothers claim that the monthly payments that OIG sent to the Stones can retroactively serve as consideration. This is not the case, because all funds sent by OIG to the Stones were sent pursuant to the Monthly Distribution Agreement, and it is axiomatic that payments under a prior obligation may not serve as consideration for a

second deal. This argument alone refutes the Kinnard Brothers' case. However, there is an even more important reason why any funds sent by OIG cannot count as consideration for David Kinnard, the only beneficiary of the assignments. David Kinnard claims that the funds that OIG sent to the Stones over the years were first (secretly) "borrowed" by him from Springfield (Aplt.App. at 532-38, 1480, ¶¶ 17 and 18.) The Kinnard Brothers admit that the Operating Agreement for Springfield (Aplt.App. at 69-89) prohibits in Section 4.3 all loans from the Partnership without written consent of the other partners. (Aplt.App. at 74-75, 725, and 1294). An employee of David Kinnard, who helped David Kinnard with the assignments, testified that David Kinnard was aware of these provisions. (Aplt.App. at 725-26, 1294). David Kinnard openly admitted during trial that the funds that he claimed he used

to pay Stone for the purported sales came from "loans" from Springfield in violation of the Operating Agreement. (Aplt.App. at 976) (Throughout the trial, it became evident that David Kinnard treated OIG and its subsidiaries as if they were his private piggybank.)

As a matter of law, actions taken by an LLC member in contravention of the LLC Operating Agreement are null, void and of no effect." *Kinwood Capital Group. LLC v. Northlake Dev., LLC (In Re Northlake Dev., LLC)*, 2007 Bankr. LEXIS 4403 (Bankr. S.D. Miss. 2007). *See also, Overhoff v. Scarp, Inc.*, 12 Misc. 3d 350, 362, 812 N.Y.S.2d 809 (N.Y. Sup. 2005). In *Overhoff*, the Plaintiff was founder, president, and general manager of a limited-liability company. Two defendants executed a written consent of a majority of the membership of the limited-liability company purporting to take certain

actions, including terminating the limited-liability company's lease, terminating the employment of all of its employees, including that of plaintiff, and agreeing to acceptance of an alleged notice of default on a promissory note from the limited-liability company to defendant corporation owned by one of the member defendants. The operating agreement required approval of all members to transfer any interest in any property, to confess judgment on behalf of the limited-liability company, and to do any act that made it impossible to carry on the ordinary business of the limited-liability company. The court held that the actions taken violated the operating agreement and therefore were void. *Overhoff v. Scarp, Inc.*, 12 Misc. 3d 350, 362, 812 N.Y.S.2d 809 (N.Y. Sup. 2005).

Likewise, in *Kinwood*, a minority member of an LLC created a new entity and transferred real

property of the LLC to the new entity without the knowledge or approval of the principal in violation of the LLC operating agreement. The member then executed a deed of trust in favor of the new entity in which he pledged the new entity's interest in the property as collateral for a loan. The court declared the transfer of the property to the new entity null and void and in turn declared the deed of trust to the third-party null and void. The court held that the deed of trust did not create a valid security interest in the property in favor of the third-party because the new entity had no interest in the property to convey to the third-party because the original transfer was in violation of the operating agreement and therefore void *ab initio*. *Kinwood Capital Group. LLC v. Northlake Dev., LLC (In Re Northlake Dev., LLC)*, 2007 Bankr. LEXIS 4403 (Bankr. S.D. Miss. 2007).

Here, the loans which David Kinnard used allegedly to buy the Stone's interests were in clear violation of the operating agreement, as even he admits. As such, they were void *ab initio* and he had no right to those funds. Therefore, the loans and subsequent "purchases" of the Stones' interests were void and of no effect. In the face of this clear precedent, the District Court erred in concluding David Kinnard's admitted violation had no effect on the transaction.

3. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN CONCLUDING THAT MINORITY MEMBERS OR PARTNERS MAY UNINTENTIONALLY WAIVE THEIR RIGHTS UNDER THEIR OPERATING AGREEMENTS OR UNDER THE UNIFORM PARTNERSHIP ACT.

A. The Standard of Review of a District Court's Conclusions of Law is "De Novo" Review.

The third issue before this Court is whether failing to object to a managing partner's or member's taking secret personal loans for himself, in violation of an express provision of the Springfield Operating Agreement and of the Oklahoma Uniform Partnership Act, could unintentionally waive a non-managing member's or partner's right to protection from such behavior by a managing member or partner. That is a pure question of law, thus the standard of review is "de novo." *Beaver v. Clingman*, 363 F.3d at 1053.

B. Under the Operating Agreement, Waiver Must be Explicit.

The District Court held, even though David Kinnard admitted to violating Springfield's Operating Agreement, that it would not unwind the transaction because the Stones waived their right to

enforce the Operating Agreement because they did not previously complain about the violations. (Aplt.App. at 1481, ¶19; Attachment 2, p. 16) However, it would have been impossible for the Stones to complain about David Kinnards' takings of "loans" from Springfield, because the Stones did not know about them until discovery in the case at bar, during David Kinnard's deposition. (Aplt.App. at 532-38, 1244) Moreover, any purported failure to object is irrelevant, because under the Springfield's Operating Agreement, "[n]o failure by any party to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute waiver of any such breach or any other covenant, duty, agreement or condition." See Section 13.4 of Springfield's operating agreement. (Aplt.App. at 88) In other

words, waivers of rights have to be done explicitly---not silently, unintentionally, and by constructive implication.

Also, under the operating agreement, any failure to complain of a prior violation does not waive their rights as to a future violation. See Section 13.4 of Springfield's operating agreement. (Aplt.App. at 88) The District Court held that the Stones failed to com-plain about prior violations; but it made no finding that the Stones affirmatively waived David Kinnard's violation as to the loans he took from Springfield related to the assignments. Because the Stones' purported failure to complain about any prior violations is irrelevant, the District Court erred in concluding the Stones waived their rights under the Operating Agreement.

Moreover, the District Court, in support of its conclusion that the Stones waived all of their rights,

found that the Stones came to court with "unclean hands" because they themselves supposedly took a loan from Springfield in 1998 without getting explicit permission from the Kinnard Brothers. (Attachment 2, p. 16) There are two major problems with this argument. First, the facts are wrong. The Stones took that loan from the Kinnard Brothers individually, not from Springfield, and repaid it to the Kinnard Brothers individually, at the insistence of the Kinnard Brothers. (See "Agreement Between Beatrice Associates and Roger and David Kinnard," dated March 27, 1998, and "Collateral Note—Installment," dated January 1, 1997, Aplt.App. at 94-101.)

The second major problem with the District Court's opinion is that it relies upon a mistake of law. The District Court, in support of its conclusion of law that the Stones waived their rights, refers this Court to the only precedent cited in its opinion: *Atlas*

Life Ins. Co. v. Schrimsher, 1937 OK 117, 179 Okla. 643, 66 P.2d 944 (Okla. 1937). Here the District Court indicates that the Stones waived their rights because, like the defendant in *Atlas Life*, they failed to complain while accepting payment from the plaintiff. (Attachment 2, p. 16) However, in *Atlas Life* the court held that the defendant's failure to complain when accepting a payment is not waiver. Furthermore, just as in the case at bar, there was "no meeting of the minds," so what appeared to be a written and signed "contract" was void. "An individual cannot waive his rights by words spoken to himself, which no third person hears, or by conduct which is never seen." *Id.*, 179 Okla. at 645, 66 P.2d at 948. At common law, waiver must be explicit. (In the case at bar, non-managing partners have the added protections of the Oklahoma Uniform Partnership Act and of OIG's operating agreements.)

C. *Under the Uniform Partnership Act, Waiver of the Managing Partner's Fiduciary Duty is Not Possible.*

Oklahoma's law of partnerships since November 1, 1997, includes the Oklahoma Revised Uniform Partnership Act, §§54-1-101 *et seq.* (2007). ORUPA provides that "An association formed under a . . . predecessor statute . . . is not a partnership under this act." §54-1-202(b) (2007). Since the original written contract between the Stones and the Kinnard Brothers was executed on October 19, 1989, and was modified in 1996, and the modification was restated on May 16, 1997, OIG and its subsidiaries fall under the predecessor statute, the Oklahoma Uniform Partnership Act ("Oklahoma UPA"), 54 Okl.St. § 201 et seq. (1989).

The Oklahoma UPA provides that, "This act shall be so interpreted and construed as to effect its

general purpose to make uniform the law of those states which enact it." 54 Okl.St. § 204(4) (1989). In other words, the applicable law of Oklahoma includes the common law of any jurisdiction that has enacted the UPA. Furthermore, "In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern." 54 Okl.St. § 205 (1989). In other words, the Oklahoma UPA is, by its own terms, not intended to be complete in itself as written but rather incorporates into itself all partnership rules from all common-law jurisdictions, whether or not they have the UPA---as long as those rules are not specifically contradicted by the UPA. The above principle of interpretation of the law of Oklahoma continues under ORUPA after November 1, 1997. §54-1-104 (2007).

The rights of a non-managing partner under the UPA include: (1) the right to an accounting,

including "full and frank" disclosure, (2) the right to be treated as the beneficiary of a fiduciary trust, with the managing partner as the trustee, (3) the right, in case of a dispute between a managing partner and a non-managing partner, to enjoy the advantage that the majority partner has the burden of proof.

Firstly, the UPA is strong and clear on the right of minority partners to access the partnership records: "Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . ." 54 Okl.St. § 220 (1989). And, "Any partner shall have the right to a formal account as to partnership affairs: . . . (b) If the right exists under the terms of any agreement [and] (d) Whenever other circumstances render it just and reasonable." 54 Okl.St. § 222 (1989). In the case at bar, the right to an accounting exists in the

organizational documents of each subsidiary. In *Barton v. Audietis*, 25 Conn.App. 92, 592 A.2d 974 (1991), the trial court denied a non-managing partner's motion for an accounting because an oral partnership was not specific on audits. The court of appeals reversed, finding that the right to an accounting is provided by the UPA without any reference to the partnership agreement, whenever "circumstances render it just and reasonable." In *Peskin v. Deutsch*, 134 Ill.App.3d 48, 479 N.E.2d 1034 (1985), the trial court, as in the case at bar, denied a non-managing partner's motion for a formal accounting because of contested payments. The court of appeals reversed, holding that, to defeat a motion by a non-managing partner for a formal accounting under the UPA, the managing partner must prove by clear and convincing evidence that he made a "full

and frank" disclosure of all contested payments and that the non-managing partner had ratified them.

Secondly, all general partners are trustees. The UPA provides:

> Partner accountable as fiduciary. Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. [emphasis added]
>
> --54 Okl.St. § 221(1) (1989).

In *NCAS Realty Management Corp. v. The Nat'l Corp. for Housing Partnerships*, 143 F.3d 38 (2nd Cir. 1998), which interprets managing partners' fiduciary duty to non-managing partners under the fiduciary provisions of the UPA, plaintiff, as in the case at bar, was local managing partner, and defendant was an out-of-state partner. Defendant counterclaimed for an accounting and to remove

plaintiff as local managing partner, based on allegations of self dealing. Defendant filed an order to show cause seeking a TRO and a preliminary injunction that would allow its chosen auditor to review the books and records. The District Court granted defendant's motion and issued an injunction granting defendant's permanent access to the partnership books and records. Quoting Chief Justice Cardozo,

> A partner, as a fiduciary, is held to higher standards than those of the marketplace. "Many forms of conduct permissible in a workday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.
> As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of con-

> duct for fiduciaries been kept at a level higher than that trodden by the crowd." *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928) (Cardozo, C.J.)
> --143 F.3d 38, at 39

In other words, the UPA has zero tolerance for managing partners who violate their fiduciary duty. Also, in *NCAS Realty Management Corp. v. The Nat'l Corp. for Housing Partnerships*, 143 F.3d 38 (2nd Cir. 1998), a magistrate judge denied defendant's motion to remove the plaintiff as managing partner, because the plaintiff had made payments to supplies for non-existent goods or services. The magistrate judge held that such wrongdoing does not rise to the level of a breach of fiduciary duty, so the plaintiff should not be punished. The Court of Appeals reversed, holding that all self-dealing by a managing general partner at the expense of a non-managing partner is a breach of fiduciary duty. A partnership is not a marketplace. Concealment alone is a breach

of fiduciary duty. *Jennison v. Bierer*, 601 F.Supp. 1167 (D.Vt. 1984). So too, is depositing a check from a client into the managing partner's own account and concealing it. *Updike v. Wolf & Co.*, 175 Ill.App.3d 408, 529 N.E. 2d 993 (1988). So too, is excluding a non-managing partner from the business so that he did not know what was going on and had no evidence of financial wrongdoing by the managing partners. *Williams v. Tritt*, 262 Ga. 173, 415 S.E.2d 285 (1992).

Thirdly, the burden of proof is on the managing partners. In *Konover Development Corp. v. Zeller*, 228 Conn. 206, 635 A.2d 798 (1994), the managing partner sued a non-managing partner, alleging breach of contract. The trial court approved a jury instruction that the managing partner had to prove that he had acted reasonably. The non-managing partner appealed, and the supreme court

reversed, holding that, under the UPA, a managing partner is a fiduciary, so when it sues a non-managing partner, it must first prove that it acted in a fiduciary manner by "clear and convincing evidence." In the case at bar, the District Court failed to find that the Kinnard Brothers had proved by clear and convincing evidence that they had acted in a fiduciary manner (nor could it have).

It is obvious that David Kinnard's concealment, denial of access to books and records, fraud, unequal "loans," violations of the organizational documents, and general predatory, unequal treatment of the Stones are breaches of fiduciary duty. And there is absolutely no precedent of a court of law in the Tenth Circuit, or in any other circuit, ratifying breaches of fiduciary duty in violation of the UPA.

4. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN GRANTING AN EQUITABLE REMEDY TO A PARTY THAT IT FOUND TO HAVE COME TO COURT WITH UNCLEAN HANDS.

A. *The Standard of Review of a District Court's Conclusions of Law is "De Novo" Review.*

The fourth issue before this Court is whether a court of the United States may grant an equitable remedy to a party that it has found to have come to court with "unclean hands." That is a pure question of law, thus the standard of review is "de novo." *Beaver v. Clingman*, 363 F.3d at 1053.

B. *The Kinnard Brothers Are Not Entitled to Any Relief, because they Come to Court with Unclean Hands.*

In the case at bar, David Kinnard concealed partnership documents and very large financial transactions (secret "loans" to himself) from the non-

managing partners, denied those partners' access to books and records, conspired to defraud those partners, gave himself and his brother unequal "loans," violated the organizational documents, and generally showed a predatory, unequal treatment of the Stones. In short, he turned OIG and its subsidiaries into his own private piggybank. Each of these acts constitutes a breach of fiduciary duty. In light of the aforementioned violations, the District Court found that David Kinnard and Roger Kinnard acted with unclean hands. (Attachments 2, p. 16) The District Court then gave the Kinnard Brothers everything they requested. In so doing, the District Court placed itself in opposition to Tenth Circuit law.

David Kinnard has admitted that he violated the various operating agreements and took loans that benefited himself and his brother while refusing

to allow Stone to take a similar loan. (Aplt.App. at 495-96, 553, 976, and 979-83) Additionally, he improperly made unequal distributions (Aplt.App. at 495-96), used partnership funds for a personal purpose, and breached his fiduciary duties as managing partner. (Aplt.App. at 976) Now he asks the Court not only to ignore his unjust and unconscionable behavior, but to give this Court's judicial stamp of approval to his actions and to allow him the benefit of his wrongdoing.

Tenth Circuit law on this question is clear. "A declaratory judgment claim that seeks construction of a contract and no relief akin to damages is an equit-able claim." *Manning v. United States*, 146 F.3d 808, 813 (10th Cir. 1998). And, "[e]quity will not intervene on behalf of a plaintiff whose conduct in connection with the same matter has been unconscientious or unjust." *City of Tulsa v. Tyson Foods,*

Inc., 258 F.Supp.2d 1263, 1311 (N.D. Okla. 2003). [E]quity will not in any manner aid a party whose conduct in relation to the litigation matter has been unlawful, unconscionable, or inequitable." *Id.*, at 1311.

5. THE DISTRICT COURT ERRED, AS A MATTER OF LAW, IN HOLDING THAT MINORITY PARTNERS DO NOT HAVE A RIGHT TO AN ACCOUNTING.

A. *The Standard of Review of a District Court's Conclusions of Law is "De Novo" Review.*

The fifth issue before this Court is whether non-managing partners have a right to a formal, independent accounting under the UPA. That is a pure question of law. A district court's conclusions of law are reviewed by a court of appeals "de novo." In "de novo" review, "no form of appellate deference is acceptable." *Beaver v. Clingman*, 363 F.3d 1048, 1053 (10th Cir. 2004).

B. *The Stones are Entitled to a Formal Accounting.*

The Stones showed above in their discussion of the UPA that the Stones have a statutory right to a formal, certified accounting when there are disputed payments. The Stones repeatedly have requested full access to the partnership books for OIG and for the various subsidiaries and have continuously been denied access. (Aplt.App. at 175, 1201, 1235, and 1277) The Stones repeatedly moved the District Court to grant them access during discovery, alleging that the managing partner was doling out some records and withholding others. (Aplt.App. at 177-321, 375-389) The Stones' expert witness testified that he did not have sufficient documents and that the Kinnard Brothers were withholding documents. (Aplt.App. at 383-85) The Stones' motions to compel access were denied by the

District Court. (Aplt.App. at 345-46, 390-91) The UPA does not permit the managing partner to dole out selectively some records and withhold others.

Also, a fair trial was not possible without the missing accounting. At trial, each side presented the testimony of an accountant as an expert witness. Both experts shared information with one another, so there was substantial agreement between the expert wit-nesses on the fact that OIG sent monthly payments to the Stones from 2000 until after the loan documents were signed in April, 2005 (Aplt. App. at 415). However, both experts lacked adequate information to testify as to what payments were made before 2000, because the District Court had denied the Stones' motions to compel discovery. (Aplt.App. at 345-53, 388-89) Therefore, there was no way they could determine what the total payments were and therefore whether they met

OIG's total obligation under the Monthly Distribution Agreement, much less consideration paid on top of that.

In addition, the Kinnard Brothers allege that the Stones sold to David Kinnard the Stones' shares in certain subsidiaries. But even the Kinnard Brothers do not contest that Robert L. Stone is still a partner of OIG, so it is incontestable that the Stones have a right to a certified accounting of OIG. However, the District Court denied the Stones' motions to compel discovery, which should have been granted routinely given their statutory right of access to the books and records. Then, in its final judgment, the District Court denied the Stones' right to an accounting even for OIG and for the subsidiaries even during the time that the District Court found that the Stones were partners in OIG and in its subsidiaries. The District Court never had

many crucial facts before it, such as the Kinnard Brothers' embezzlement and the appraisal of the properties to show the absurdity of the Kinnard Brothers' price term they filled in later. It is impossible to reconcile the District Court's final judgment with the Oklahoma UPA and thereby with Tenth Circuit law that uses the law of the States as the rules of decision in diversity cases.

CONCLUSION

The District Court's Findings of Fact and Conclusions of Law are inconsistent with Tenth Circuit law, the partnership agreements, and the Uniform Partnership Act. The only way to uphold the law is to reverse the judgment of the District Court, to hold that all transactions after David Kinnard's violations of the UPA and various organizational documents are void *ab initio*, to unwind all subsequent transactions, to order an independent certified

accounting, to order all parties to return any and all loan funds improperly advanced in contravention of the Operating Agreement, and to order both sides to equalize the partnership accounts. (Aplt.App. at 1389-91)

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Because of the importance of this case, because the holding of the District Court contravenes Tenth Circuit law in five different ways, and because the standard of review on most of the issues presented in this appeal is *de novo*, oral argument will be helpful to the Court.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(c), I certify that this brief is proportionally spaced and contains 12,285 words. I relied on my word processor to obtain the court, and it is Microsoft Word 2003. I certify that the information in this certificate is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

By: s/Jennifer Majewski
Jennifer Majewski
Attorney for Appellants

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing Appellants' Opening Brief, as submitted in Digital Form, is an exact copy of the written document filed with the Clerk of this Court and has been scanned for viruses with the Symantec Endpoint Protection ver-sion 11.0.3001.2224, Virus Definition File Dated: 11/25/2008 rev. 4, and, according to the program, is free of viruses.

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I hereby certify that on November 26, 2008, I emailed a copy of the Appellants' Opening Brief to:

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Case: 08-6210 Document: 09671415 Date Filed: 07/09/2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Robert L. Stone et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	**Case No. 08-6210**
	)	
David H. Kinnard et al.,	)	
	)	
Appellees.	)	

On Appeal from: United States District Court
for the Western District of Oklahoma
The Honorable Judge Russell
CIV-07-250-R

PETITION FOR REHEARING EN BANC

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June 29, 2009

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Robert L. Stone and Cynthia A. Stone, Appellants Pro Se, pursuant to Fed.R.App.P. Rule 35, petition that this honorable Court rehear en banc the appeal in the case at bar.

RULE 35(b)(1)(B) STATEMENT

I express a belief, based on reasoned and studied judgment, that this appeal involves three questions of exceptional importance: (1) whether a managing partner who drafts and uses "severely deficient," self-serving documents, who denies an accounting to his minority partners, who comes to court with "unclean hands," and who evidences "a general lack of credibility" is fulfilling his fiduciary duty under the Uniform Partnership Act; (2) whether the Uniform Partnership Act's mandatory provisions for an accounting to protect minority partners is fulfilled when the minority partner is

allowed at trial to sit and listen to the hostile testimony of a hired-gun witness with whom he has never spoken and who was paid for his testimony only by the managing partner; and (3) whether the unpublishing system employed by the Tenth Circuit Court of Appeals is consistent with the Due Process Clause, including the doctrine of stare decisis.

[s] Robert L. Stone
Robert L. Stone
Appellant Pro Se

THE FACTS

In 1987, Robert and Cynthia Stone ("the Stones") and David Kinnard and Roger Kinnard ("the Kinnard Brothers") formed a general partnership, Oklahoma Investment Group ("OIG"). Using funds contributed mostly by the Stones, OIG purchased and managed real estate in Norman and Oklahoma City with an equity value of

approximately $6 million. The Kinnard Brothers own approximately a 2/3 interest in OIG, and the Stones, as minority partners, own the balance. David Kinnard is the managing partner and controls all of the books and records.

In 2004 and 2005, David Kinnard drafted a series of documents and demanded that the Stones sign them, which documents the District Court found were "severely deficient." (Exhibit A, attached hereto, at 1) David Kinnard told the Stones in writing that the documents were for the purpose of securing a loan, which the Kinnard Brothers had promised to make to the Stones. The Stones signed the "severely deficient" documents at the request of Roger Kinnard (because the Kinnard Brothers had a long history of deficient documents, because the Kinnard Brothers had behaved themselves in the past, and because Roger Kinnard had been a friend

of the Stones for thirty years and is the birth father of the Stones' oldest daughter, whom Robert L. Stone adopted). After the severely deficient documents were signed, the Kinnard Brothers fraudulently declared that the documents were really sales and took all of the Stones' partnership shares, driving them into bankruptcy and ruining them financially. Because the Kinnard Brothers owed the Stones $363,526 in delinquent partnership distributions at the time of the fraud, the Kinnard Brothers paid a *negative* $363,526 for the Stones' shares, which are worth approximately $2 million. The Kinnards then denied the Stones' requests for an accounting, arguing that the Stones were no longer partners.

The Kinnard Brothers then sued the Stones for a declaratory judgment that what they did to the Stones was legal. The Stones counterclaimed asking that the Court: (1) declare that what the Kinnard

Brothers did to them was illegal and a breach of fiduciary duty, (2) unwind the tainted transaction, and (3) order the Kinnard Brothers to provide an independent, certified accounting as provided for in the Uniform Partnership Act, under which OIG was organized. During the discovery phase, the Stones found out by searching the documents in the Office of the County Recorder that the Kinnard Brothers in 1998 had mortgaged most of the properties owned by OIG, that they had secretly "cashed out" approximately $2 million, and that they had distributed all of that sum to themselves without notice to the Stones. During the discovery phase, the Kinnards refused to produce any financial records from 1998, saying that they could not find them. The Stones moved in a timely manner to compel discovery and to file a First Amended Complaint to add the

allegations of embezzlement and asked the court to unwind the "severely deficient" transactions.

THE TRIAL

At trial, David Kinnard denied all of the above facts. The Stones testified as to Roger Kinnard's request and promises and testified that only Roger Kinnard had negotiated the severely deficient documents with them and that the Stones had had nothing to do with drafting those documents. Roger Kinnard chose not to testify at all. A witness by the name of David Payne, who was paid for his testimony only by the Kinnard Brothers and who has never spoken with the Stones, testified that everything the Kinnards Brothers did was reasonable, everything they said was true, and that there is no need whatsoever for the missing 1998 gap in the financial records.

THE LAW

The Uniform Partnership Act provides:

§219. Partnership Books.
The partnership books shall be kept . . . at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

§220. Duty of Partners to Render Information.
Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . .

§221. Partner Accountable as Fiduciary.
(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

§222. Right to an Account.
Any partner shall have the right to a formal account as to Partnership affairs: (a) if he is wrongfully excluded from the partnership business or possession of its property by his copartners, . . or (d) Whenever other circumstances render it just and reasonable.

There is no ambiguity in the case law interpretting this statute. An independent, certified accounting is a right for which the remedy of a TRO is available. All general partners are fiduciaries. There is zero tolerance for wrong-doing by Fiduciaries. *NCAS Realty Management Corp. v. The Nat'l Corp. for Hous-ing Partnerships,* 143 F.3d 38 (2nd Cir. 1998). Concealment alone is a breach of fiduciary duty. *Jennison v. Bierer,* 601 F.Supp. 1167 (D.Vt. 1984). Exclusion alone is a breach of fiduciary duty. *Williams v. Tritt,* 262 Ga. 173, 415 S.E.2d 285 (1992). The burden of proof is on the managing partner. *Konover Development Corp. v. Zeller,* 228 Conn. 206, 635 A.2d 798 (1994). And the law of Oklahoma incorporates decisions from all other UPA States, so all of the above are not merely advisory. 54 Okl. St. §204(4) and 205 (1981). A partnership is not a marketplace.

The Fifth Amendment to the Constitution of the United States provides that:

> No person shall be . . . deprived of . . . property, without due process of law . . . .

THE DISTRICT COURT'S DECISIONS

The District Court denied the Stones' timely motions to compel discovery and denied the Stones' timely motion to file a First Amended Complaint. Then the District Court found that David Kinnard was the managing partner, found that the Kinnard Brothers came to court with "a general lack of credibility" and with "unclean hands" with relation to the "severely deficient" documents, and found that therefore it is "a near impossibility for even the experts to discern the actual history of transactions between the parties." (See Exhibit A, attached hereto, at 1 and 16.)

Nevertheless, the District Court accepted the testimony of David Payne without qualification, granted the Kinnards' request for a declaratory judgment in every detail, and denied the Stones' request for an independent, certified accounting. The Court, without clearly stating its holding, held that preparing and keeping "severely deficient" self-serving documents, coming to court with "unclean hands," and evidencing "a general lack of credibility" are consis-tent with the fiduciary duty of a managing partner under the Uniform Partnership Act. Also, the Court, without clearly stating its holding, held that the UPA's requirement of an accounting to protect minority partners is fulfilled when the minority partner is allowed at trial to sit and listen to the hostile testimony of a witness with whom he has never spoken and who was paid for his testimony only by the managing partner.

THE APPEAL

The Stones appealed to the U.S. Court of Appeals for the Tenth Circuit. On June 8, 2009, a panel of three judges (Kelly, author; Lucero; and Hartz) in an unpublished opinion, applying a new standard of extraordinary deference, affirmed the judgment of the District Court in its entirety. (See Exhibit B, attached hereto.)

THE ARGUMENT

This Court's opinion of June 8, 2009, is inconsistent with all precedents from all States that have enacted the Uniform Partnership Act and all courts of the United States that have interpreted it. Never before has any State or federal court held that (1) drafting and use of "severely deficient" documents that are used against the minority partners, or (2) denial of an accounting to minority partners, or (3) coming to court with "a general lack of credibility"

and "unclean hands" is consistent with the statutory fiduciary duty of a managing partner under the UPA. The case at bar involves all three at once.

Never before has any State or federal court held that the mandatory accounting provision of the UPA to protect minority partners is fully satisfied when the minority partner who has been stripped of his shares is allowed to sit in court to listen to the hostile testimony of a witness with whom he has never spoken and who was paid for his testimony only by the managing partner. This is because to do so would ruin the UPA.

Likewise, this Court in its opinion of June 8 is employing a new standard of review, that of extra-ordinary deference, which is inconsistent with its own caselaw and which is not explained.

This Court is doing what it is doing because it can do so in such a way that its decision is not a

(dangerous) legal precedent. It does this by the simple expedient of issuing an unpublished opinion. The decision ruins the Stones but not the UPA, which this Court wisely does not want to sacrifice.

However, unpublished opinions violate the legal principle of *stare decisis*, which is part of the "due process" guarantied by the Fifth Amendment. The doctrine of *stare decisis* is the hallmark of a system of laws. *Ex Parte Bollman*, 8 U.S. [4 Cranch] 75, 87 (1807). Unpublished decisions are "secret laws" that result in decision-making without the discipline and accountability that the preparation of published opinions requires. *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Marshall, J., dissenting). Unpublished opinions are of poor quality; this Court is capable of doing better; and litigants before this court deserve the best of which this Court is capable. Anything less is less than the

process we all are due. See W. Richman and W. Reynolds, "Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition," 81 *Cornell L. Rev.* 273, 284 (1996).

CONCLUSION

THEREFORE, for all of the foregoing reasons, this Court's decision of June 8, 2009, conflicts with the law of all States that have enacted the Uniform Partnership Act, with all circuits that have interpreted it, and with the law of the United States, including but not limited to the Fifth Amendment.

Respectfully submitted,

[s] Robert L. Stone

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition is doubled spaced, employs a type size of 14, and contains 2,938 words in 13 pages. I relied on my word processor to obtain the court, and it is Microsoft Word 2003.

[s] Robert L. Stone
Robert L. Stone
Appellant Pro Se

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2009, using Federal Express, I sent an original and three copies of this Petition to the Clerk of the 10th Circuit Court of Appeals and one original to opposing counsel at the following address:

Gregory N. Eddington
3116 Carlton Way
Oklahoma City, OK 73120

Additionally, I e-mailed a copy to Mr. Eddington at the following address:

greg.eddington@gmail.com

[s] Robert L. Stone
Robert L. Stone
Appellant, Pro Se

09 (3) 506

No. 09-06

Supreme Court, U.S.
FILED
FEB - 4 2010
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

The Children's Fund et al.,

Petitioners,

v.

Springfield Holding Co. Ltd. LLC et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING

Robert L. Stone
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Counsel for Petitioners

The Petitioners herein respectfully move that this Court issue an order (1) vacating its denial of their petition for writ of certiorari, entered by this Court on January 11, 2010, and (2) granting the petition. As grounds for this motion, Petitioners state the following:

1. RESPONDENTS HAVE OFFERED NO ARGUMENT IN OPPOSITION.

Since the Petition in this case was filed on October 7, 2009, Respondents have offered no reason why the Petition should not be granted. They have not responded because there is nothing they can say. The Petition presents pure questions of law, and there is no controlling precedent that they can cite against Petitioners.

We are acutely aware of the practical realities of the discretionary review system. Counsel for the

Petitioners knows that, as an advocate, he is particularly sensitive to the injustices suffered by his clients and that he knows very little about the other cases that are competing for the Court's time and attention. And he knows that this Court works very hard at the challenging task of making hard choices every day.

Nevertheless, it is hard to imagine circumstances under which this case would not be considered worthy of at least allowing briefs on the merits. This case involves what began as a well-intentioned, minor court reform (the unpublication system) which has, without anyone intending it, mushroomed over the last thirty years into an out-of-control national legal scandal that adversely affects every litigant before the United States Courts of Appeals. "Unpublished" opinions, which are printed but cannot be cited as precedent, now account for

84% of all opinions issued by the Courts of Appeal (and adversely affect the remaining 16%). Since these opinions cannot be cited for precedent, the courts in writing them, of course, do not follow precedents. And a court that does not follow precedents is no longer a court of law. It is an unconstitutional mini-legislature. And in the face of this staggering practical problem and departure from our Constitutional system, Respondents can offer *no reason* why the Petition should be denied.

2. THE UNPUBLICATION SYSTEM HAS A DISPROPORTIONATE IMPACT ON LITIGANTS WITH LIMITED RESOURCES.

The unpublication system is not just Petitioners' problem. It is a systemic problem. In this case, the Petitioners are a small, private school that had an endowment of approximately $2,000,000. That endowment was taken from them in a fraudulent

transaction by investment partners. The District Court, in an opinion in which the Court in effect admitted that it did not understand the issues, refrained from enforcing the law. The Court of Appeals, in an unpublished opinion, refrained from intervening, because an unpublished opinion can have no direct effect on other litigants, so (in a sense) the damage was controlled. For the trial before the district court, Petitioners were billed $209,469.87. The appeal cost the Petitioners another $25,000. After committing a quarter of a million dollars because the District Court had reason to believe that it would not be overruled if it refrained from enforcing the law---and because the Court of Appeals does not have to follow precedent if it uses the unpublication system---the Petitioners' resources are now exhausted.

The unpublication system is a systemic problem because a litigant who has less than a quarter of a million dollars to spend on a system that no longer follows precedent can no longer afford to take the risk of litigation in the federal courts. Therefore, the present system of unpublication necessarily has the effect of multiplying litigation, both by the wealthy and by the fraudulent, who (one way or another) hold the cards and can afford to play the game. It necessarily has the effect of suppressing litigation by any party who has less than a quarter of a million dollars available to spend on litigation, especially after they are defrauded. The unpublication system therefore, paradoxically, has the effect of burdening the courts by multiplying undesirable litigation and burdening plaintiffs by suppressing desirable litigation.

3. THIS ISSUE NEEDS TO BE FULLY BRIEFED, WITH SUBMISSIONS BY AMICI CURIAE.

The question of the validity of the unpublication system is an issue of obvious national importance. This case is in effect a class action with the Petitioners representing all litigants before the United States Courts of Appeal now and in the future, and everyone who has less than a quarter million dollars available for litigation. It is possible to argue (Petitioner did not) that constitutional niceties must be suspended because of the sheer force of the recent explosion in litigation. It is possible to argue (Petitioner did not) that the problem is too big for this Court to handle and must be addressed by Congress and by an expansion of the Courts of Appeal. It is possible to argue (Petitioner did not) that the entire Anglo-American tradition of courts that follow legal precedents is either not

desirable or no longer feasible. It is possible to argue (Petitioner did not) that the Constitution contemplates courts of appeal that are not required to follow precedents. But these arguments need to be heard, and all of the litigants before the courts of appeals deserve to have an opportunity to refute them.

In preparing the Petition, counsel for the Petitioners wrote to the ABA, to law-school professors, and to public-interest law firms to ask whether they would be interested in submitting *amicus curiae* briefs in this case. Several of them indicated that they would like to help, but it makes no sense (unless one has either a very wealthy or a politically motivated client paying the bill) to write *amicus curiae* briefs for a Court that can accept less than 1 in 90 of the Petitions addressed to it. If, on the other hand, this Court were to set this case for

briefing on the merits, several such *amici curiae* would quickly come forward. And the issue needs them and deserves them. It would be presumptuous for anyone to decide this question without their considered contribution.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, Petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition, and schedule this case for a briefing on the merits.

February 4, 2010

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this motion for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2.

_____

Counsel for Petitioner